United States General Accounting Office

GAO

Office of General Counsel

November 1987

Decisions of the Comptroller General of the United States

Volume 67

Pages 39-106

Notice

Effective October 1, 1987, a revised vocabulary has been used to index Comptroller General decisions and other legal documents. The new vocabulary used three types of headings—class headings, topical headings, and subject headings—to construct index entries which represent the subject matter of the documents. An explanation of the revised vocabulary is provided in the GAO Legal Thesaurus. Copies of the Thesaurus are available from the GAO Document Distribution Center, Room 1000, 441 G Street, NW, Washington, D.C. 20548, or by calling (202) 275-6241.

For sale by the Superintendent of Documents,
U.S. Government Printing Office, Washington, D.C. 20402

Current GAO Officials

Comptroller General of the United States
Charles A. Bowsher

Deputy Comptroller General of the United States
Vacant

Special Assistant to the Comptroller General
Milton J. Socolar

General Counsel
James F. Hinchman

Deputy General Counsel
Vacant

Associate General Counsels
Rollee H. Efros
Seymour Efros
Richard R. Pierson
Henry R. Wray

Contents

Preface

This pamphlet is one in a series of monthly pamphlets which will be consolidated on an annual basis and entitled *Decisions of the Comptroller General of the United States.* The annual volumes have been published since the establishment of the General Accounting Office by the Budget and Accounting Act, 1921. Decisions are rendered to heads of departments and establishments and to disbursing and certifying officers pursuant to 31 U.S.C. 3529 (formerly 31 U.S.C. 74 and 82d.) Decisions in connection with claims are issued in accordance with 31 U.S.C. 3702 (formerly 31 U.S.C. 71.) In addition, decisions, on the validity of contract awards pursuant to the Competition In Contracting Act (31 U.S.C. 3554(e)(2) (Supp. III) (1985), are rendered to interested parties.

The decisions included in this pamphlet are presented in full text. Criteria applied in selecting decisions for publication include whether the decision represents the first time certain issues are considered by the Comptroller General when the issues are likely to be of widespread interest to the government or the private sector; whether the decision modifies, clarifies, or overrules the findings of prior published decisions; and whether the decision otherwise deals with a significant issue of continuing interest on which there has been no published decision for a period of years.

All decisions contained in this pamphlet are available in advance through the circulation of individual decision copies. Each pamphlet includes an index-digest and citation tables. The annual bound volume includes a cumulative index-digest and citation tables.

To further assist in the research of matters coming within the jurisdiction of the General Accounting Office, ten consolidated indexes to the published volumes have been compiled to date, the first being entitled "Index to the Published Decisions of the Accounting Officers of the United States, 1894-1929," the second and subsequent indexes being entitled "Index of the Published Decision of the Comptroller" and "Index Digest—Published Decisions of the Comptroller General of the United States," respectively. The second volume covered the period from July 1, 1929, through June 30, 1940. Subsequent volumes have been published at five-year intervals, the commencing date being October 1 (since 1976) to correspond with the fiscal year of the federal government.

Decisions appearing in this pamphlet and the annual bound volume should be cited by volume, page number, and date, e.g., 64 Comp. Gen. 10 (1978). Decisions of the Comptroller General which do not appear in the published pamphlets or volumes should be cited by the appropriate file number and date, e.g., B-230777, September 30, 1986.

Procurement law decisions issued since January 1, 1974, and Civilian Personnel Law decisions whether or not included in these pamphlets, are also available from commercial computer timesharing services.

To further assist in research of Comptroller General decisions, the Office of the General Counsel at the General Accounting Office maintains a telephone research service at (202) 275-5028.

Table of Decision Numbers

Cite Decisions as 67 Comp. Gen.—

Uniform pagination. The page numbers in the pamphlet are identical to those in the permanent bound volume.

List of Claimants, etc.

Tables of Statutes, etc.

United States Code

See also U.S. Statutes at Large

Published Decisions of the Comptrollers General

Decisions Overruled or Modified

Decisions of the Court

November 1987

B-227835.3, B-227835.5, November 2, 1987

Procurement

Contract Management
■ Contract Administration
■■ Convenience Termination
■■■ Administrative Determination
■■■■ GAO Review

Where the offerors were unaware of the actual basis for award, award under such solicitation was properly terminated.

Procurement

Competitive Negotiation
■ Discussion
■■ Adequacy
■■■ Criteria

Discussions cannot be meaningful if an offeror is not apprised that its price exceeds what the agency believes to be reasonable.

Procurement

Competitive Negotiation
■ Discussion Reopening
■■ Auction Prohibition

Where reopening of negotiations is properly required, notwithstanding the disclosure of an offeror's proposal, this does not constitute either technical leveling or an improper auction.

Procurement

Competitive Negotiation
■ Unbalanced Offers
■■ Materiality
■■■ Determination
■■■■ Criteria

Even though an offer may be mathematically unbalanced, it is not materially unbalanced where there is no doubt it will result in the lowest cost to the government.

Matter of: The Faxon Company

The Faxon Company protests the termination of a contract for periodical subscription services for a base year and 2 option years, awarded by the Veterans Administration (VA) under request for proposals (RFP) No. 794-4-87. Faxon also protests the award of a contract to American Overseas Book Company (AOBC) under that solicitation.

The protests are denied.

The VA awarded a contract to Faxon on May 26, 1987, based on best and final offers (BAFOs) which had been received on April 27. However, the VA, on reviewing a protest from AOBC, determined that the procurement had been improperly conducted and that the award was improper. The VA terminated Faxon's contract for convenience and reopened negotiations with the offerors in the competitive range, Faxon and AOBC.

The Termination

Faxon alleges that the VA's termination of its contract was arbitrary and baseless and was done in response to an untimely protest filed with our Office by AOBC. Faxon also contends that the VA improperly reopened negotiations following the termination, that Faxon was prejudiced because its price and technical score were revealed, that the technical requirements have been degraded so as to accommodate AOBC, and that the VA accepted an unbalanced offer from AOBC. Faxon contends that the VA improperly only asked Faxon how it would compensate in performance for the delays resulting from the resolicitation which was caused by AOBC's protest of the RFP.

Faxon also contends that the VA contravened the "stay" provisions of 4 C.F.R. § 21.4(a) (1987) by requesting BAFOs while two protests were pending before the General Accounting Office (GAO) and by not providing a determination that urgent and compelling circumstances would not permit waiting for the GAO decision until its contemporaneous decision to award to AOBC.

Regarding this last issue, our Bid Protest Regulations, 31 U.S.C. § 3553(a) (Supp. III 1985), state that when the contracting agency receives notice of a protest from us prior to award of a contract it may not award a contract under the protested procurement while the protest is pending, unless the head of the procuring activity responsible for award of the contract determines in writing and reports to us that urgent and compelling circumstances significantly affecting interests of the United States will not permit waiting for our decision. 4 C.F.R. § 21.4(a). Although that provision requires that an agency not make an award unless a determination of urgent and compelling circumstances is made, it does not require the cessation of any other agency action on the solicitation, such as the request for BAFOs, and it does not prohibit the agency from making an award at the same time it notifies our Office of its decision that urgent and compelling circumstances exist. *See Progressive Learning Systems,* B-218483, July 23, 1985, 85-2 CPD ¶ 72.

The VA states that, after the competitive range was determined under the initial RFP, an excluded offeror protested that the evaluation criteria were different from those stated in the solicitation. The VA sustained the protest and issued amendment No. 3 listing eight evaluation criteria (there were four criteria under the solicitation prior to the amendment). The amendment, however, did not state the relative importance of the criteria, or indicate the importance of price. No statement was included as to how award was to be made.

The evaluation plan, not disclosed in the RFP, assigned 74 points for the technical categories with categories receiving as many as 20 points or as few 5 points. The contracting officer determined that any offeror submitting an offer between $1.2 and $2 million would receive the full 25 points for cost.

Faxon received a total of 71 technical points and its cost proposal for 3 years of $1,805,218, per the contracting officer's formula, received 25 points, thus resulting in a total score of 96 points. AOBC's proposal received a perfect technical score of 74 points, and its cost proposal of $2,021,538 was awarded the full 25 points for a total score of 99, the maximum that could be received. Upon review of the final scores and evaluation, the contracting officer determined to make award to Faxon, based on its lower-priced offer, even though AOBC received more total points.

After a debriefing, AOBC protested to our Office that the VA failed to conduct meaningful negotiations, that the VA misapplied the evaluation factors, that Faxon's proposal was generally deficient, and that AOBC should have been awarded the contract as the highest-scored offeror.

The VA found that certain elements of AOBC's protest were meritorious. VA found that no meaningful negotiations had been held with AOBC concerning its automated claiming (ordering) proposal and that award was made essentially on the basis of price. Automated claiming or ordering allows personnel at VA libraries, through computer terminals, to place subscription orders directly with the contractor. VA states that AOBC was never advised that its automated claiming proposal had a greater capacity than required. The VA found that AOBC misinterpreted the requirements for claiming due to its experience as the incumbent on the prior contract; the VA states that it should have pointed out that the requirements had been relaxed from the prior year's specifications. Apparently, the VA believes that had it done so AOBC might have offered a lower price.

The VA also noted that the evaluation and award was not made properly because the RFP listed eight evaluation criteria, including cost, without any statement concerning relative importance. The VA states that each criterion should have been, but was not, considered equally important.

The VA decided that it would be in the best interest of the government to terminate the Faxon contract for convenience and reopen negotiations with all offerors in the competitive range.

Faxon argues that any ambiguities which might have existed in the solicitation were not of such significance as to prejudice AOBC and require amending the RFP. In this connection, Faxon points out that none of the offerors knew what relative weight would be applied to the technical criteria or to price. If anything, Faxon argues, AOBC benefited from receiving the full 25 points for price even though its price was in excess of the VA's range for the full 25 points.

Faxon argues that VA's revision to the specifications did not result in changes to AOBC's or Faxon's technical proposals or scores, thereby proving that the termination was unwarranted. Faxon also contends that discussions with AOBC were unnecessary since it received a perfect score and, in any event, AOBC's costs were minimally affected by any possible misunderstanding it may have had as to automated claiming.[1]

It is fundamental that offerors should be advised of the basis on which their proposals will be evaluated. *Union Natural Gas Co.*, B-225519.4, June 5, 1987, 87-1 CPD ¶ 572. We have recognized that a solicitation that does not set forth a common basis for evaluating offers, which ensures that all firms are on notice of the factors for award and can compete on an equal basis, is materially deficient. In this case, the RFP did not reflect how offers actually were evaluated.

Where, as here, an RFP indicates that cost will be considered, without explicitly indicating the relative weight to be given to cost versus technical factors, it must be presumed that cost and technical considerations will be considered approximately equal in weight. *Actus Corporation/Michael O. Hubbard and LSC Associates*, B-225455, Feb. 24, 1987, 87-1 CPD ¶ 209. During the evaluation, the VA gave a much greater weight to technical than cost but ultimately the VA awarded on the basis of cost. In effect, what happened was that the RFP did not state a basis for evaluation, then the proposals were evaluated on an unstated basis, and finally award was made inconsistent with the evaluation. Additionally, the offerors did not know how price would be weighted and had they known price would have been determinative, they could have modified their proposals accordingly. The fact that AOBC was the only offeror to receive a perfect score for price and technical and yet did not receive the award in itself shows the invalidity of the evaluation scheme.

Compounding this error was VA's failure to point out AOBC's excessive level of effort as to automated claiming. 41 U.S.C. § 253b(d)(2) (Supp. III 1985), requires that written or oral discussions be held with all responsible sources whose proposals are within the competitive range. Such discussions must be meaningful and, in order for discussions to be meaningful, agencies must point out weaknesses, excesses, or deficiencies in proposals unless doing so would result either in disclosure of one offeror's approach or in technical leveling. *The Advantech Corp.*, B-207793, Jan. 3, 1983, 83-1 CPD ¶ 3; *Ford Aerospace & Communications Corp.*, B-200672, Dec. 19, 1980, 80-2 CPD ¶ 439.

---

[1] Faxon, also contends that the VA improperly considered AOBC's protest because it was untimely under our Bid Protest Regulations. However, when a contracting agency recognizes the validity of a protest and proposes to take appropriate corrective action, it is irrelevant whether the protest complied with our Bid Protest Regulations. *Macro Systems, Inc.*, B-208540.2, Jan. 24, 1983, 83-1 CPD ¶ 79.

During discussions, agencies are prohibited from advising an offeror of its price standing relative to other offerors, Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.610(d)(3) (1986), and are not required to point out that a proposed price is too high if the price is still below the government estimate. *University Research Corp.*, B-196246, Jan. 28, 1981, 81-1 CPD ¶ 50. On the other hand, discussions cannot be meaningful if an offeror is not apprised that its price exceeds what the agency believes to be reasonable. *Price Waterhouse*, 65 Comp. Gen. 206 (1986), 86-1 CPD ¶ 54.

The VA should have pointed out to AOBC that its costs were excessive for automated claiming. AOBC was put in the untenable position of not being able to improve its perfect score yet not being able to receive award. Meaningful discussions, had they been held, would have led AOBC to the areas of its proposal where it could have improved the possibility of receiving the award. We have held that where an improper award has been made, termination and recompetition of a negotiated contract is appropriate. *Sperry Corp.*, B-222317, July 9, 1986, 65 Comp. Gen. 715, 86-2 CPD ¶ 48. We find, therefore, that the VA's termination of Faxon's contract for these procurement deficiencies was appropriate.

The Award to AOBC

Turning now to Faxon's protest of the manner in which the reopening of negotiations was conducted and the award to AOBC, Faxon argues that it was placed at a competitive disadvantage because, at a debriefing, AOBC was advised of Faxon's price, portions of Faxon's technical proposal and its evaluation scores. Faxon contends that this constituted technical transfusion and leveling and that the reopened negotiations represented an auction.

The VA has responded that there was no technical transfusion or leveling, nor was Faxon's technical proposal revealed to AOBC. What was discussed at the debriefing was the manner in which Faxon's proposal and AOBC's proposal were evaluated. While Faxon's price was disclosed to AOBC, during the subsequent negotiations, AOBC agreed to release its price to Faxon so that AOBC would not have an unfair competitive advantage.

We have held that where reopening of negotiations is properly required, notwithstanding the disclosure of an offeror's proposal, this does not constitute either improper technical leveling or an improper auction. *Sperry Corp., supra.* In addition, there is nothing inherently illegal in the conduct of an auction in a negotiated procurement. Rather, the possibility that a contract may not be awarded based on true competition on an equal basis has a more harmful effect on the integrity of the competitive procurement system than the fear of an auction. *Id.* The statutory requirements for competition take primacy over the regulatory prohibitions of auction techniques. *PRC Information Sciences Co.*, 56 Comp. Gen. 768, 783 (1977), 77-2 CPD ¶ 11.

Here, the VA made a particular effort to equalize the competition by requiring price disclosure by all offerors. Faxon has offered no evidence that the contents

of its technical proposal were released to AOBC during the debriefing. Accordingly, this basis of protest is denied.

Faxon also protests that the specifications were degraded in the resolicitation to accommodate AOBC because AOBC could not meet the original requirement that an offeror have a catalog of 100,000 titles.

The VA argues that it did not downgrade the technical specifications to ensure that AOBC could meet reduced requirements. The VA states that the original specification, as amended by amendment No. 3, called for:

> Annual Serial Catalog (a) Capability to produce catalog exhibit dealing with at least 50 percent of U.S. publishers and lists at least 100,000 titles.

Amendment No. 7 revised this requirement to a catalog of 10,000 titles. Faxon states that AOBC's catalog contains less than 13,000 titles whereas Faxon has a hard copy catalog of 48,000 titles, a microfiche listing of 85,000 titles, and a computerized data base of 200,000 titles.

The VA states that this requirement was revised to clarify the VA's actual minimum needs and was not issued for the purpose of favoring AOBC's proposal. The VA explains that it interpreted the original requirement in amendment No. 3 as specifying a catalog with 100,000 titles, yet no offeror met this requirement. Although Faxon states it has the capability of generating these titles, Faxon's catalog has only 48,000 titles. VA argues that under a reasonable interpretation of the specifications, Faxon also did not comply since it offered a catalog of only 48,000 titles. Accordingly, VA states it issued amendment No. 7 to clarify both the number of titles it actually required in the catalog as well as to correct the data elements required for an acceptable title list.

Based on the record before our Office, no offeror complied with the original requirement of 100,000 titles and therefore the changed requirement favored neither offeror. Since the VA determined that it had overstated its minimum needs, such a change in the specifications to more accurately reflect these needs was proper.

Concerning Faxon's argument that AOBC's offer is unbalanced, Faxon states that AOBC's base year price of $579,023.47, which is higher than its price for the two option years ($497,759.30 and $527,032.95), respectively, is front-loaded. The VA points out that AOBC explained, upon the VA's request after initial BAFOs on the resolicitation, that AOBC is to be billed for the cost of its performance bond in the first year of contract performance, thus increasing AOBC's first year cost. The VA states that the options for both years will be exercised. In any event, AOBC's first year price is lower ($579,023.47) than Faxon's first year price ($583,483.50), so there is no doubt that the award to AOBC will result in the lowest ultimate cost to the government, notwithstanding whether the options will be exercised.

Finally, Faxon protests that only it was questioned during negotiations about how it would meet the delivery schedule due to the delays in performance connected with the termination and resolicitation which resulted from AOBC's

original protest. However, the record shows that both AOBC and Faxon were asked the same question regarding accelerated performance and, therefore, this basis of protest is denied.

The protests are denied.

B-228090, November 2, 1987

Procurement

Competitive Negotiation
■ Discussion
■■ Adequacy
■■■ Criteria

Procurement

Competitive Negotiation
■ Offers
■■ Evaluation Errors
■■■ Non-Prejudicial Allegation

Contracting agency's failure to inform protester of deficiencies in its technical proposal, which was included in the competitive range, deprived the protester of the opportunity to participate in meaningful discussions. Protester, however, was not prejudiced since its cost proposal was so much higher than the awardee's cost proposal that, even if protester had raised its technical proposal to the level of the awardee's, the protester would not have been awarded the contract.

Matter of: B.K. Dynamics, Inc.

B.K. Dynamics, Inc. (B.K.), protests the award of a contract to Techplan Corporation under Department of the Air Force request for proposals (RFP) No. F49620-87-R-0006, issued to obtain a contractor to provide international cooperative research and development assessments. B.K. contends that the Air Force improperly failed to conduct meaningful discussions with the firm.

We agree with B.K. that the discussions that were held were not meaningful, but we deny the protest because the record shows that this deficiency did not prejudice B.K. in the competition.

The RFP solicited offers for a base period of 8 months and four 1-year option periods. Cost proposals were to be evaluated on the basis of the base and option years, although the government expressly reserved the right to award a contract that included options for fewer than 4 years. The solicitation also provided that technical merit would be the most important factor in the selection decision, although cost also would be important.

The Air Force received five proposals, with Techplan's cost proposal the third lowest and B.K.'s the highest. The technical evaluation concluded that Techplan's proposal was technically superior to the other proposals, but that four of

the five offerors, including B.K., should be included in the competitive range. The Air Force conducted written discussions with those four offerors concerning only their cost proposals, and requested best and final cost offers. Techplan's final cost proposal was second low, while B.K.'s cost proposal remained high. The Air Force determined that Techplan's proposal offered the best overall value to the government and awarded a contract to that firm for the base period, which also included options for 2 more years, with the decision whether to exercise those options to be made later in the contract period.

B.K. protests that the Air Force's failure to conduct technical discussions with the firm was a violation of the agency's statutory duty to hold meaningful discussions with all offerors in the competitive range. B.K. argues that if the Air Force had pointed out the deficiencies in B.K.'s technical proposal and had given the firm an opportunity to submit a revised technical proposal, B.K. might have been able to raise its technical score sufficiently to outrank Techplan's.

The Air Force responds that while B.K.'s proposal had some weaknesses relative to the technical evaluation factors, the evaluators found that B.K. had a thorough understanding of the agency's needs, and the proposal was not marked down significantly in any area. The Air Force argues that it therefore was proper not to conduct technical discussions with B.K. because the evaluators did not have any questions concerning B.K.'s technical proposal. The agency additionally notes that the RFP was for expert and consultant services which are dependent on staff, and avers that technical discussions were not warranted anyway because the proposal could not have been significantly improved without replacing key personnel, a major proposal revision. Finally, the Air Force asserts that because B.K. thoroughly understood the technical requirements of the RFP, any technical discussions with the firm would have resulted in technical leveling or technical transfusion, which are prohibited by the Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.610(d) (1986).

The Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2305b(4)(B) (Supp. III 1985), and its implementing regulation, FAR, 48 C.F.R. § 15.610(b), require that written or oral discussions be held with all responsible sources whose proposals are within the competitive range. Such discussions must be meaningful, that is, agencies must point out weaknesses, excesses or deficiencies in the offeror's proposal unless doing so would result in technical transfusion or technical leveling. FAR, 48 C.F.R. § 15.610(d)(1) and (2); *Price Waterhouse,* B-222562, Aug. 18, 1986, 86-2 CPD ¶ 190. Once discussions are opened with an offeror, the agency must point out all deficiencies in the offeror's proposal, and not merely selected ones. *Jones & Co.,* B-224914, Feb. 24, 1987, 66 Comp. Gen. 283.

Here, the Air Force's request for best and final cost proposals constituted discussions, so that the failure to discuss technical matters was proper only if B.K.'s initial technical proposal contained no uncertainties or weaknesses. *See Sperry Corp.,* 65 Comp. Gen. 195 (1986), 86-1 CPD ¶ 28. We do not find that this was the case. For example, as indicated by the debriefing summary, the evaluators found that B.K. did not give samples of the Contract Data Requirements

Lists formats for required deliverables, and that B.K.'s proposal for certain items listed in the statement of work did not demonstrate sufficient program manager involvement. Our review of the technical evaluation also shows that B.K.'s proposal was downgraded for failure to address or elaborate on certain factors. These omissions are the type that may well have been resolved through technical discussions. *See Furuno U.S.A., Inc.*, B-221814, Apr. 24, 1986, 86-1 CPD ¶ 400.

Further, we do not agree with the Air Force that technical discussions would have led to prohibited technical transfusion or technical leveling. Technical leveling arises only where, as a result of successive rounds of discussions, the agency has helped to bring one proposal up to the level of another proposal by pointing out inherent weaknesses that remain in the proposal because of the offeror's own lack of diligence, competence or inventiveness after having been given an opportunity to correct them. *See Price Waterhouse,* B-222562, *supra.* Here, however, the Air Force did not hold even one round of technical discussions with B.K. We also do not see how there would have been any risk of technical transfusion—improperly transferring Techplan's approach to B.K. through discussions, *see* FAR, 48 C.F.R. § 15.610(d)(2)—if B.K. had been informed of omissions in its own proposal. We therefore find that the Air Force failed to hold meaningful discussions with B.K.

Despite our conclusion, however, our Office will sustain a protest alleging that the government failed to hold meaningful discussions with a firm only if the protester demonstrates that it was prejudiced by the government's actions. *See Science and Management Resources, Inc., et al.*, B-212628, *et al.*, Jan. 20, 1984, 84-1 CPD ¶ 88. The record does not show that B.K. was prejudiced here. First, B.K. itself states that if the Air Force had pointed out technical deficiencies in the firm's offer, "BK's proposal could have been revised, perhaps sufficiently to enable BK to outrank Techplan technically." Thus, B.K. itself acknowledges that technical discussions would not necessarily have raised B.K.'s technical proposal to the level of Techplan's proposal. Further, the RFP provided that both technical merit and cost would be considered in choosing the successful offeror; B.K.'s evaluated best and final cost offer was $1.2 million higher than Techplan's final cost offer of $1.93 million, and B.K. does not suggest that it could have sufficiently lowered its cost proposal further to be competitive with Techplan. Thus, even if B.K. had been able to raise its technical proposal to the level of Techplan's, B.K. still would not have received the award.

B.K. also protests that the Air Force could not properly award a contract to Techplan that included a base period and provision for 2 option years because the RFP required offerors to submit prices for 4 option years. Paragraph L-24 of the RFP, however, specifically reserved to the Air Force the right to award a contract that provided for fewer than 4 option years. Therefore, the award was consistent with the terms of the solicitation, and thus is not subject to legal objection by our Office.

The protest is denied.

B-177617, November 6, 1987

Appropriations/Financial Management

Claims by Government
Credit Cards
Acceptability

Except where prohibited by statute, agencies may accept commercial credit card transactions in payment for amounts owed to the United States, subject to certain safeguards. However, where the Miscellaneous Receipts Act (31 U.S.C. § 3302(b) (1982)) applies, credit card company commissions must be paid from the agency's current operating appropriations, rather than be deducted from the proceeds of the credit card transaction itself.

Appropriations/Financial Management

Appropriation Availability
Purpose Availability
Credit Cards
Fees

Under 16 U.S.C. § 460*l*-6a(f) (1982), the Department of Agriculture (USDA) may allow credit card companies to deduct their commissions from the proceeds of commercial credit card transactions charged to the public for "reservation services." However, without additional statutory authority, commissions on credit card transactions for other kinds of USDA services or fees must be paid from current operating appropriations

Matter of: Acceptance of Payment by Commercial Credit Card

The Assistant Secretary for Natural Resources and Environment, United States Department of Agriculture (USDA), requested our opinion regarding the acceptance of commercial credit card transactions in payment for amounts owed to the government by private individuals and organizations. Because the credit card companies usually deduct their fee from the amount charged to the credit card holder, USDA questions whether accepting credit card transactions would violate the so-called "Miscellaneous Receipts Act," 31 U.S.C. § 3302(b) (1982).

USDA is authorized by the Land and Water Conservation Act, as amended, 16 U.S.C. §§ 460*l*, 460*l*-6a (1982), to assess and collect a variety of fees and permit charges. Previously, USDA has been willing to accept only cash payments for those fees and permit charges. Now, however, USDA wants to offer credit card transactions as an alternative method of payment for "user fees collected at recreation sites" and for "firewood, Christmas tree permits, special use permits, and similar authorized uses and products from the National Forest System Lands." According to USDA, in fiscal year 1985, sales to the public of just three of those classes of permits amounted to approximately $320,000. Aside from the fact that purchasers frequently request to pay via credit card as a convenience to them, USDA believes that the acceptance of credit card transactions would significantly reduce USDA's administrative costs and increase its efficiency.

We conclude that, in the absence of an express statutory prohibition, an agency may legally accept payment of amounts owed to the United States in the form of commercial credit card transactions. However, where 31 U.S.C. § 3302(b) ap-

plies, credit card company commissions may not be deducted from the proceeds of the transactions, and to this extent, the use of commercial credit cards may not offer a practical alternative under existing law.

Authority to Accept Payment by Credit Card

We have previously held that agencies may accept commercial credit card transactions in payment for goods and services provided by the government, except where credit sales are expressly prohibited. 56 Comp. Gen. 90 (1976); 52 Comp. Gen. 764 (1973). In those cases, we observed that "while the government does not ordinarily provide goods or services on credit, there is no general statutory prohibition against credit sales." 56 Comp. Gen. at 91 (citing 52 Comp. Gen. at 765). Those decisions were "premised on the [agency's] representation that this practice would facilitate sales without [significantly] increasing administrative costs or prices charged to customers." *Id.* Allowing the use of credit card sales was expected to enhance the agencies' performance of their statutory functions by enabling them to operate more efficiently and conveniently. Finally, the interests of the United States were adequately protected by credit card company guarantees to pay for purchases made by duly accepted credit cards. 56 Comp. Gen. at 92; 52 Comp. Gen. at 765.

We see no reason why the principle enunciated in those two decisions should not apply equally to the payment of any and all amounts owed to the United States, subject to the same safeguards. Acceptance of payment by credit card should not result in significant increases in the cost to the government, or any increase in the cost to the person making the payment;[1] should adequately protect the government's interest by means of credit card company guarantees to reimburse the government for all properly conducted credit card transactions; and should facilitate and enhance performance of the agency's program and collection responsibilities. If these conditions apply, then agencies may exercise sound discretion to accept credit card transactions as an additional (and optional) means of paying amounts owed to the United States. (We do not believe that agencies may require payments to be made by credit cards.)

Deducting Credit Card Company Commissions from Proceeds

Credit card companies normally charge a fee of 3 to 5 percent of the transaction amount. As USDA notes, the companies customarily collect this fee by deducting it from the amount to be paid to the vendor (i.e., the agency). Because of

[1] The requirement that there be no additional cost to the payor does not apply to payments made on *delinquent* debts owed the United States. Agencies are required to assess administrative charges to cover the costs of processing and handling delinquent debts. 31 U.S.C. § 3717(e)(1) (1982); 4 C.F.R. § 102.13(d) (1986). Neither the statute nor the implementing regulations itemize all of the elements that may be assessed as administrative costs. *See* 49 Fed. Reg. 8889, 8893 (1984). If an agency chooses to permit payment of delinquent debts by credit card, we think the agency may treat the credit card company's commission as an administrative cost to be assessed against the debtor— in the same manner as the cost incurred in using a private debt collector, etc. However, the agency should disclose this liability to the debtor when the credit card option is offered.

this, as explained below, the use of commercial credit cards may not be a feasible option under existing law.

The problem is that, under 31 U.S.C. § 3302(b), unless otherwise provided by law, each agency is generally required to deposit into the general fund of the Treasury *all* amounts received by its officers and agents, "without deduction for any charge or claim." Thus, where this act applies, the agency has no authority to allow a credit card company to deduct its commissions from payment made via credit card, unless there is some other express statutory authority to do so.[2] USDA suggests that the necessary authority may be found in two specific (and otherwise unrelated) statutory exceptions to the miscellaneous receipts act—31 U.S.C. § 3718(d) (1982) (debt collection contractor fees), and 16 U.S.C. § 460*l*-6a(f) (1982) (reservation service contractor fees).

1. Debt Collection Contractor Fees.

The provisions of 31 U.S.C. § 3718(d) (formerly § 3718(b), *as redesignated by* Pub. L. No. 99-578, § 1, 100 Stat. 3305 (1986)), create an express exception to the Miscellaneous Receipts Act in order to authorize agencies to pay debt collection contractor fees by means of deductions from collection proceeds. USDA admits that "the language employed in 31 U.S.C. § 3718 tends to indicate that the use of credit cards was not contemplated specifically [by Congress when this law was enacted] . . . ." Nevertheless, USDA argues:

> . . . Even if a contract with credit card issuers and vendors cannot meet the literal language of 31 U.S.C. § 3718, clearly, Congress intended to give the head of an agency wide latitude to his choice of collection mechanisms. Allowing the use of credit cards for payments would appear to be in keeping with this Congressional intent.

To the extent that the amounts being paid via credit card represent the payment of *delinquent* debts, we agree that the provisions of section 3718(d) would authorize deductions for credit card company commissions. However, if those amounts represent payments on *non-delinquent* debts, the exemption (from the Miscellaneous Receipts Act) in section 3718(d) would not apply. This conclusion follows from a previous decision of this Office to the effect that section 3718(d) does not apply to the collection of *non-delinquent* debts, or to "account servicing," etc. 64 Comp. Gen. 366 (1985).

2. Reservation Service Contractor Fees.

The provisions of 16 U.S.C. § 460*l*-6a authorize USDA to assess a variety of "Admission and special recreation use fees." (USDA calls these assessments "user fees collected at recreation sites.") Paragraph (a) of that section concerns "Admission fees" and various "permits;" paragraph (b) concerns "Recreation use fees" and "fees for Golden Age Passport Permitees;" and paragraph (c) concerns "Special Recreation Permits." Paragraph (f) is entitled "Disposition of fees; contracts with public or private entities for visitor reservation services." It reads, in pertinent part, as follows:

---

[2] The effect of 31 U.S.C. § 3302(b) was not an issue in 52 Comp. Gen. 764 and 56 Comp. Gen. 90, cited earlier, because of the particular statutory authorities involved in those cases.

Except as otherwise provided by law . . . *all fees* which are collected by any Federal agency [pursuant to this section] *shall be covered into a special account in the Treasury* of the United States to be administered in conjunction with, but separate from, the revenues in the Land and Water Conservation Fund; Provided, that the head of any Federal agency, under such terms and conditions as he deems appropriate, may contract with any public or private entity to provide *visitor reservation services;* and any such contract may provide that the contractor shall be permitted to deduct a commission to be fixed by the agency head from the amount charged to the public for providing *such services* and to remit the net proceeds therefrom to the contracting agency. *Revenues in the special account shall be available for appropriation* . . . for any authorized outdoor recreation function of the agency by which the fees were collected . . . . 16 U.S.C. § 460*l*-6a(f) (added by Pub. L. No. 93-303, § 1(j), 88 Stat. 192, 194 (1974)). [Italic supplied.]

Clearly, paragraph 460*l*-6a(f) authorizes USDA to enter into contracts with public or private entities in order to obtain "reservation services" and allows those contractors to deduct their commissions for providing these services from fees that they collect on behalf of the government. Thus, this provision would authorize credit card companies to deduct commissions from receipts. However, by its very terms, it applies only with respect to amounts charged to the public for reservation services; it does not authorize deductions from the fees assessed pursuant to paragraphs (a), (b), or (c) of section 460*l*-6a.[3]

The first sentence of 16 U.S.C. § 460*l*-6a(f), quoted above, requires that all fees collected under the authority of § 460*l*-6a be deposited in a special account in the Treasury. Thus, except for the special provision for reservation services, there would be no authority to deduct credit card company commissions from these other fees.

Of course, none of the foregoing discussion is intended to suggest that credit card companies may not be paid a commission on amounts which are charged for credit to the government for the other kinds of fees and charges provided in section 460*l*-6a. We are saying merely that without additional statutory authority, that commission must be paid out of the agency's current appropriations and not by deduction from the amount charged.

Conclusions

We conclude that, in the absence of express statutory prohibition, agencies may, in the exercise of sound discretion, legally accept commercial credit card transactions in payment of amounts owed to the United States, including amounts owed for goods and services, and amounts owed on account of delinquent and nondelinquent debts. However, we also conclude that, without express statutory authority to do so, agencies may not allow credit card companies to collect their commissions by means of deductions from amounts charged for credit to the United States.

[3] The legislative history of this provision confirms this interpretation. In H.R. Rep. No. 1076, 93rd Cong., 2d Sess. 5 (1974), for example, it was explained that:

Under existing law all fees go into a special account in the Land and Water Conservation Fund to the credit of the collecting agency. No change is made in this respect, *but the bill makes clear that the Secretary may contract for reservation services and that the charge imposed for making such reservation need not be paid into the special account. While the proceeds for camping use would be the same, this language is designed to eliminate transfers of funds for providing reservation services.* [Italic supplied.]

We think payment by credit card is a desirable option which may facilitate the administration of some government programs presently operated on a cash basis. At the very least, it should be available to federal agencies, subject to the exercise of sound discretion. Under existing law, however, an agency wishing to accept credit card transactions for payments subject to 31 U.S.C. § 3302(b) (or other similar statutory restriction) has basically two options:

(1) The agency may try to negotiate an agreement whereby the credit payment is paid over to the agency in its entirety for credit to the appropriate account, with the agency paying the contractor's commission from current appropriations in a separate transaction; or

(2) The credit card company may deduct its commission from amounts to be paid to the government agency, with the agency then promptly transferring the amount of the fee from current appropriations to the account to which the payment is to be credited.

The first option may not be acceptable to the credit card company; the second is somewhat impractical and administratively burdensome.

Accordingly, to enable agencies to realize the maximum potential benefit from credit card transactions, we would support legislation (perhaps along the lines of 31 U.S.C. § 3718(d)) to establish an exemption from 31 U.S.C. § 3302(b) for credit card arrangements.

B-225673, *et al.* November 6, 1987

Appropriations/Financial Management

Claims Against Government
■ Unauthorized Contracts
■■ Quantum Meruit/Valebant Doctrine

Procurement

Payment/Discharge
■ Unauthorized Contracts
■■ Quantum Meruit/Valebant Doctrine

Claims asserted against the United States Navy by the governments of the United Kingdom and Italy (which arose in the course of a routine and continuing series of transactions that hinge directly upon the long-standing, day-to-day relationships of the governments involved) may be paid, despite the absence of supporting official records, because their validity and non-payment have been satisfactorily substantiated

Appropriations/Financial Management

Claims Against Government
■ Statutes of Limitation

A claim asserted against the United States Navy by the government of the Netherlands may not be paid, because the claim was not actually received at GAO within 6 years after the date on which the

claim accrued (i.e., the date when fuel was delivered, not the date on which the Netherlands issued its bill for payment of the fuel), as required by 31 U.S.C. § 3702(b)(1) (1982).

Appropriations/Financial Management

Claims Against Government

■ Statutes of Limitation

GAO may not waive the provisions of 31 U.S.C. § 3702(b)(1) (1982), and lacks the jurisdiction necessary to consider whether a claim barred by operation of that act might be valid under the laws of another country because section 3702(b)(1) is not a mere "statute of limitations," but rather is a "condition precedent" to the right to have the claim considered by GAO.

Matter of: British, Dutch and Italian Claims for Fuel and Services for U.S. Navy Vessels.

This decision considers three separate claims asserted against the United States Navy by agencies of the governments of the United Kingdom, the Netherlands, and Italy. Each claim requests reimbursement for alleged provision of fuel or support services to Navy vessels which either operated in conjunction with the vessels of those three governments, or visited their naval bases. Two of these claims have been previously considered and disallowed by our Claims Group. The third claim was referred to us by the Claims Group and has not previously been acted upon. For the reasons given below, the claims asserted by the governments of the United Kingdom and Italy may be paid. However, the claim asserted by the Netherlands is time-barred.

Background

1. The United Kingdom (B-225673; Claim No. Z-20(738)).

According to materials submitted by Navy, the Government of the United Kingdom (UK) maintains that on May 24-25, 1982, its naval forces provided a variety of services and supplies to the U.S.S. Clark during its visit at the British naval base at Gibraltar. The UK claims that, although it has submitted detailed additional information and repeated bills to Navy, none of those services or supplies have ever been paid for. (The British claim totals 4541.14 pounds sterling.) Navy advised our Claims Group that despite an exhaustive record search, it could confirm only that the U.S.S. Clark was in Gibraltar on the dates in question. Navy can neither verify nor dispute that the supplies and services at issue were in fact received or whether payment was made. Based on the absence of Navy records to confirm the validity of this claim, the Claims Group disallowed payment in its settlement dated August 12, 1986.

In seeking this reconsideration, The British Ministry of Defence contends:

It is not in dispute that USS Clark visited Gibraltar during the 24/25 May 1982. *It is inconceivable that during the period of the visit the ship would not have been provided with [these] logistics services* for which payment should have been made. The fact that on the US side the records have been destroyed is inconvenient but it does not destroy the validity of [the] claim . . . . [Italic supplied.]

In response to the Ministry's contention, Navy agreed that "it is highly probable that USS Clark . . . received the port services [and supplies] in question. . . ."

---

2. Italy (B-180569; Claim No. Z-2475653).

Apparently, Italy's claim arose in a similar fashion to that of the UK, but involves more than one ship and concerns fuel supplies only, as provided on several occasions during 1978-80.[1] A listing of those transactions follows:[2]

U.S. SHIP	PORT or SOURCE [3]	DATE	LIRE
U.S.S. Cavalla	La Spezia, Italy	3/20/78	2,689,230
U.S.S. Escape	La Spezia, Italy	5/5/78	5,396,460
U.S.S. Lawrence/Sampson	ITN Vesuvio	5/22/78	91,938,665
U.S.S. Manley	ITN Stromboli	5/30/78	16,902,120
U.S.S. Biddle	La Spezia, Italy	10/27/78	20,364,000
U.S.S Peterson	ITN Stromboli	10/15/79	16,007,134
U.S.S. Comte De Gras	ITN Stromboli	5/13/80	203,871,745

[3]The designation "ITN" identifies the source as a vessel of the Italian Navy. Otherwise, the reference is to a port in Italy.

According to Navy, Italy first submitted bills for these transactions in October 1983. Sometime thereafter, those bills and the related Navy records were mislaid. As with the claim of the UK, Navy has been able to verify that the vessels at issue here were in fact in the ports, or operating in conjunction with the Italian ships on the dates listed above. Based essentially on probabilities, Navy believes that the fuel was most likely provided and that payment has not been made, but has not been able to establish this with any degree of certainty. Navy recommends payment.[4]

---

3. Netherlands (B-224905; Claim No. Z-2863216).

On June 11, 1976, the U.S.S. Koontz obtained some fuel at Den Helder, Netherlands. Navy does not dispute that the fueling took place as claimed, nor does it challenge the amount charged by the Netherlands ($32,806.65). However, Navy's submission states that the government of the Netherlands "mislaid" the paperwork on this transaction and consequently delayed submitting an invoice for it until June 1984, more than 6 years after the transaction occurred. Referring to the 6-year statute of limitations prescribed in 31 U.S.C. § 3702(b)(1), Navy has refused to pay the claim.

---

[1] The record shows that, in order to toll the 6-year statute of limitations prescribed by 31 U.S.C. § 3702(b)(1), Navy sent copies of the Italian bills to our Claims Group in February 1984. Thus, there is no statute of limitations problem in this claim.

[2] This list was derived from Navy's letter of August 20, 1986. A slightly different list was provided to us by the United States Defense Attache Office in Rome by means of "telex" dated March 1986. As explained below, we conclude that Italy's claim may be paid. However, before making payment, Navy should try to reconcile the differences.

[4] This matter was not previously considered by our Claims Group.

The Netherlands continues to press its claim, maintaining that an invoice was sent to the United States Embassy at the Hague on September 8, 1976, 3 months after the transaction. The Netherlands adds that it has made continuous efforts to secure payment of this claim over the years since. The Netherlands believes that this claim is governed by Dutch law since the transaction occurred in Dutch territory, and argues that under Dutch law, its claim is not yet barred by the passage of time. Nonetheless, in its settlement of October 9, 1985, our Claims Group observed that the claim was not received at GAO until May 7, 1985, and based on 31 U.S.C. § 3702(b)(1), disallowed the claim.

Pursuant to discussions with Navy, the Netherlands submitted a new invoice, dated April 10, 1986 (which was included with Navy's submission in this matter). Navy's submission concludes: "We believe that the United States is morally obligated to make payment, irrespective of whatever fault the Dutch have in this matter."

Discussion

We have long held that the claimant bears the burden of proof in establishing its claim. *E.g.,* 31 Comp. Gen. 340 (1952); B-184712, Mar. 3, 1976. Normally, of course, government records are used to help satisfy that burden. However, claims may be paid even though official records have been lost or destroyed, or are otherwise unavailable, but only if the claimant furnishes other clear and satisfactory evidence which reasonably substantiates both the validity of the claim and the absence of prior payment.

With regard to the British and Italian claims, we think that despite the absence of supporting official records, their validity and non-payment have been satisfactorily substantiated. In both cases, we understand that the claims arose in the course of a routine and continuing series of transactions which hinge directly upon the long-standing, day-to-day relationships of the governments involved. In neither instance does the Navy dispute these claims. To the contrary, Navy suggests that it is particularly unlikely that its vessels did not receive the supplies and services claimed, and Navy believes that the amounts being claimed by the UK and Italy are reasonable. Consequently, Navy recommends these claims be paid. We agree. Navy may therefore promptly process these claims for payment, if otherwise correct.

With regard to the claim asserted by the Netherlands, however, the crucial issue is not the absence of records and burden of proof, but rather the timeliness of the claim's submission to GAO. Under 31 U.S.C. § 3702(b)(1), every claim asserted against the United States which lies within the scope of GAO's claims settlement authority must be "received by the Comptroller General within 6 years after the claim accrues . . . ." Our previous decisions have read this language strictly and literally to mean that claims must actually be filed with GAO before the expiration of the 6-year period. Filing with the particular agency against which the claim is asserted will not satisfy the statute. *E.g.,* 62 Comp. Gen. 187, 192 (1983); 57 Comp. Gen. 281, 283 (1978). Transmittal by the

agency to GAO will be sufficient, as occurred here with the Italian claim, but this did not happen with respect to the Netherlands claim, and the claimant must bear the ultimate responsibility for complying with the statute. We have no authority to waive the act's requirements. *E.g.*, 64 Comp. Gen. 156, 158 (1984); 25 Comp. Gen. 670, 672 (1946).

A claim "accrues" under this statute on the date when all events necessary to establish the government's liability have occurred. *E.g.*, 42 Comp. Gen. 622, 623-24 (1963). In a transaction such as this, the last event which is necessary to establish the government's liability is the fueling itself, not the receipt of an invoice for its payment. The date on the invoice, or the submission of a new invoice does not influence the date on which the statutory period begins to run. Hence, the April 1986 invoice is of no legal effect. (To conclude otherwise would allow the creditor to circumvent the statutory limitation at will merely by issuing a new invoice. *Cf., e.g.*, B-152388, Mar. 4, 1964.)

Accordingly, our Claims Group was correct in finding the claim time-barred. With respect to the suggestion that Dutch law should apply, it is sufficient to note that the passage of time has deprived GAO of the jurisdiction to consider the claim any further. *See, e.g.*, 64 Comp. Gen. 155, 160 (1984) (Barring Act "is not a mere statute of limitations, but is a condition precedent to the right to have the claim considered by our Office. . . ."); B-151285, May 16, 1963 ("The act is not a mere statute of limitations but simply deprives the General Accounting Office of jurisdiction to settle claims . . . ."). Of course, nothing we have said here precludes the government of the Netherlands from pursuing any judicial remedies that may be available to it.

Notwithstanding the foregoing, there may be one remaining possibility for administrative relief. The fueling of a Navy vessel is surely related to the national defense. Thus, Navy may wish to consider the possibility of relief under the authority of Public Law 85-804, 50 U.S.C. §§ 1431-1435. We offer no opinion on the feasibility of this approach since GAO has no jurisdiction under Public Law 85-804 and determinations under it are not subject to our review. *E.g.*, B-212529, May 31, 1984.

B-228099, November 6, 1987

Procurement

Special Procurement Methods/Categories
■ Federal Supply Schedule
■■ Purchase Orders
■■■ Equivalent Products
■■■■ Propriety

Issuance of a delivery order to Federal Supply Schedule contractor who responded to request for quotations (RFQ) by proposing items which did not literally meet the RFQ's specifications is not objectionable where contractor's items were functionally equivalent and satisfied the government's needs.

Matter of: Crenlo, Inc./Emcor Products

Crenlo, Inc./Emcor Products (Crenlo), protests the Department of the Army's issuance of a delivery order to Stantron Corp. under oral request for quotations (RFQ) No. 87-494 for furniture storage frames and panels. Crenlo states that its product is the only one that meets the Army's specifications. We deny the protest.

Since the furniture was a Federal Supply Schedule (FSS) item, the Army orally solicited quotations from FSS contract holders. The Army asked for quotations on frame assemblies and panels, specifying Emcor part numbers or equivalent, and listed various height, width, and depth dimensions. Stantron submitted the lowest of the three quotations received; Crenlo's quotation was third low.

Crenlo contends that the products offered by the other vendors do not meet all the dimensions of the Emcor products, nor are they of the same metal thickness or appearance, so that Crenlo should have received the order. Crenlo further contends that had the Army specified only dimensions, and not Emcor part numbers, Crenlo would have offered a less expensive and completely compatible alternative.

When a formal solicitation is issued, vendors are required to respond with offers that comply with all material provisions of the solicitation. An offeror's failure to comply with all such provisions renders the bid nonresponsive or the proposal unacceptable. When quotations are solicited from FSS vendors, however, the situation is not the same. The quotations are not offers that can be accepted by the government; rather, they are informational responses, indicating the equipment the vendors would propose to meet the agency's requirements and the price of that equipment and related services, which the government may use as the basis for issuing a delivery order to an FSS contractor. There is, therefore, no requirement that the quotation comply precisely with the terms of an RFQ since the quotation is not subject to government acceptance. *Kardex Systems, Inc.*, B-225616, Mar. 12, 1987, 87-1 CPD ¶ 280.

Here, both Stantron and the intervening offeror responded to the RFQ by proposing frames and panels which were the functional equivalent of the Emcor products. The record does confirm that there were slight differences in the specifications of the offered products; however, the Army concluded that Stantron's products satisfied its requirements at a lower price than the products offered by Crenlo. Once the Army concluded that Stantron's lower-cost items met its needs, it was required to place the order with that vendor. *See* Federal Acquisition Regulation (FAR), 48 C.F.R. § 8.405-1 (1986).

Further, the record does not establish that the Army, by specifying Emcor part numbers rather than only dimensions, effectively required Crenlo to offer those particular products instead of ones the vendor believed were equivalent notwithstanding that they might not be precisely the same. First, the Army did not expressly require the Emcor products, since all vendors were advised that equivalent products could be offered. Second, the specifications relayed to vendors did not include a desired metal gauge or appearance, so that we think vendors rea-

sonably could assume that products identical to the Emcor ones in every respect did not have to be offered; Crenlo's argument that the metal gauge and appearance of offered products had to be the same as Emcor's is inconsistent with the advice given the vendors. Finally, we note that the Stantron products meet all the dimensions that actually were specified, except that the frame's top panel opening is 25-5/8 inches in depth instead of the requested 25-1/4 inches; the field activity, however, found that difference inconsequential.

In these circumstances, we do not think the Army misled Crenlo into incorrectly believing it could not offer an equivalent product the firm felt would meet the Army's needs.

The protest is denied.

B-227839.2, November 9, 1987

Procurement

Bid Protests
■ GAO Procedures
■■ Protest Timeliness
■■■ 10-Day Rule

Where the protester does not learn of the weight the agency gave to certain technical/performance evaluation factors until the debriefing conference, a protest that the agency gave too much weight to those technical/performance factors and too little weight to price is timely when filed within 10 working days after the debriefing conference.

Procurement

Bid Protests
■ GAO Procedures
■■ Protest Timeliness
■■■ 10-Day Rule

Protest that the Army's testing of protective masks and analysis of those test results bear no relation to real battle situations and therefore should not have been used to predict casualties is dismissed as untimely where the protester was aware of the test methods, witnessed the tests, and apparently was satisfied with the testing during the 2-1/2 year period during which tests were conducted. It was only after the protester's mask was shown to be rated lower than the awardee's mask that the protester voiced complaints about testing and analysis—about 8 months after the completion of testing.

Procurement

Competitive Negotiation
■ Requests for Proposals
■■ Evaluation Criteria
■■■ Cost/Technical Tradeoffs
■■■■ Weighting

Where the request for proposals (RFP) indicates that technical/performance, cost, and production capability will be considered in the evaluation of proposals, without any indication of each factor's relative weight, each factor is assumed to be accorded substantially equal weight in the evaluation; protest of the evaluation is sustained where the agency considered the technical/performance factor to be significantly more important than the other factors set forth in the RFP.

Matter of: ILC Dover, Inc.

ILC Dover, Inc., protests the award of a fixed-price, multi-year contract to Scott Aviation Company by the Department of the Army under request for proposals (RFP) No. DAAA15-87-R-0035. Under the contract, Scott is to produce and supply the Army with 300,000 chemical/biological protective masks and related items. The contract also contains an option for an additional 150,000 masks. Scott is to supply 87,900 units of the basic mask (designated the XM40) for use by infantrymen and 212,100 units of a variant of that mask (designated the XM42) for use by combat vehicle crewmen. ILC Dover contends that the award to Scott was improper because the Army did not evaluate proposals in accord with the evaluation criteria set forth in the RFP.

We sustain the protest.

Background

In 1982, the Army canceled a program to develop a new mask, designated the XM30, because the mask proved unsatisfactory during testing (in large part due to limitations in its polyurethane flexible lens). At that time, the Army began a two-phase program to develop the XM40 series mask (the subject of the present RFP). The XM40 mask and its variants will replace the Army's current family of protective masks, and the mask design chosen by the Army under the present RFP will be the Armed Forces' chemical/biological mask through the end of this century.

Late in 1982, the Army solicited proposals from several firms for Phase I of the XM40 series mask development program. Contracts were awarded to three firms: ILC Dover, Scott, and Mine Safety Appliances Company. The contractors were to conduct design studies using "minimum change/minimum risk" approaches to develop a new protective mask by retaining the positive features of the XM30 mask and incorporating the rigid lens system of a previously proven mask (the M17A1). The contractors also were to fabricate a small number of prototypes for testing, issue a design report, and submit proposals for Phase II of the program. Based on the design reports, evaluation of the test prototypes,

and the fabrication proposals, the Army approved mask designs and awarded Phase II contracts to ILC Dover and Scott only.

Under the Phase II contracts, ILC Dover and Scott each produced over 1,000 masks of their own design for extensive evaluation and testing by the Army. In addition, the two contractors provided engineering support to the Army during product testing, fabricated the necessary tooling and molds, and updated the XM30 mask technical data package to document the approved mask design and incorporate changes made during testing. Testing was completed in December of 1986. Based upon these tests, the Army concluded that both the ILC Dover and Scott mask candidates fulfilled the Joint Services Operational Requirements (JSOR), which set forth the essential characteristics and levels of protection required for protective masks.

The Army determined that it was in the public interest to limit the competition for the initial production contract to Scott and ILC Dover, the only two firms that had participated in the second phase of the development program. Accordingly, the Army issued the present RFP to Scott and ILC Dover on February 6, 1986. Both firms submitted timely proposals, and after evaluation of proposals and the Phase II test results, the Army awarded a contract to Scott on June 24, 1987. The reason for selecting Scott, even though ILC Dover's offer was considerably lower in price, was the Army's conclusion that Scott's proposal was better than ILC Dover's in the two most important (of the 11) technical/performance subfactors: "protection" and "reliability, availability and maintainability" (RAM). ILC Dover filed its protest in our Office on July 2.

Protest Issues

ILC Dover contends that the Army's decision to award the contract to Scott is contrary to the evaluation scheme set forth in the RFP. ILC Dover believes that its masks meet or exceed all requirements of the JSOR and are substantially as good as the Scott masks. ILC Dover also believes that its production capabilities are superior to Scott's. ILC Dover concludes that it therefore should have been awarded the contract because its price for the basic quantity was only $35,019,750, while Scott's price was $51,823,181, or $16,803,431 higher.

ILC Dover also complains that the Army's evaluation was unreasonable because the Army tried to predict the number of battlefield casualties that would occur using each mask from "quantitative fit" laboratory tests the Army conducted; ILC Dover contends that there is no direct relationship between the laboratory tests and the protection afforded soldiers when the masks are used on the battlefield. ILC Dover alleges that the Army's statistical analysis of the protection factor data collected in laboratory tests was flawed in a number of respects so that while it appeared that the Scott mask might have a significant protection factor advantage over the ILC Dover mask, the data collected in fact do not reveal a statistically significant difference between the masks.

Timeliness

The Army and Scott argue that it was clear from the RFP's evaluation scheme that the Army intended to give significant weight in its evaluation to the protection and RAM subfactors. Therefore, they contend that ILC Dover's basic argument—which they construe as being that the Army had to give the same score to both masks on technical/performance factors because both met all JSOR requirements— is untimely under section 21.2(a)(1) of our Bid Protest Regulations. 4 C.F.R. Part 21 (1987).

Scott and the Army misconstrue ILC Dover's protest. The thrust of ILC Dover's protest is that the Army did not actually evaluate proposals in accord with the criteria set forth in the RFP. ILC Dover acknowledges that the Army properly could evaluate proposals under each of the 11 separate technical/performance subfactors set out in the RFP, but argues strenuously that the Army gave too much weight to the protection and RAM subfactors and too little weight to price. The Army told ILC Dover at a June 30th debriefing that its award decision was based upon the Source Selection Authority's determination that Scott's significant superiority in the protection and RAM areas outweighed the cost savings of ILC Dover's proposal. Since ILC Dover filed its protest on July 2, within 10 working days after the debriefing conference at which it learned the specific basis for the award, this portion of the protest is timely. *Intelcom Educational Services, Inc.*, B-220192.2, Jan. 24, 1986, 86-1 CPD ¶ 83; 4 C.F.R. § 21.2(a)(2).

ILC Dover also argues that during development of the MX40 mask design, the Army's testing of mask prototypes was flawed in a number of ways. Further, ILC Dover believes the Army's analysis of the test results was invalid and the Army improperly tried to predict actual battlefield casualties from tests that bear little or no relation to real battle conditions. The Army admits that to some degree its testing methods have weak points with respect to predicting what might occur on the battlefield. The Army is adamant, however, that it did the best job possible and that its test methods and analysis were reasonable. In this respect, the Army reports that it built its mask testing facility and designed its testing procedures only after extensive consultation with government and private industrial hygiene experts throughout the world.

This basis of protest is untimely. The Army reports that ILC Dover representatives were brought into the test facility to assist the Army in conducting some of the earliest tests. The Army also reports that ILC Dover has used the Army's test facility on more than one occasion to evaluate the protective capabilities of various prototypes it was developing for the Army. The contracting officer states that ILC Dover was intimately familiar with the test procedures used by the Army and witnessed the testing of its mask. In this regard, we note that the Army consulted with ILC Dover when its mask was performing poorly due to a leakage problem, that ILC Dover was allowed to fix the leakage by partially redesigning its mask, and that the Army used only test results for ILC Dover's mask obtained after the mask was fixed. The Army also states that ILC Dover

was on notice of the statistical methods the Army intended to use to evaluate the test results as early as May 16, 1986, when the Army provided ILC Dover with some of the test results.

ILC Dover apparently was satisfied with the test methods throughout the 2-1/2 year period of testing, and only complained of the alleged deficiencies when the tests showed its mask to be less technically proficient than the Scott mask. In our opinion, it is unreasonable for ILC Dover to lodge its first complaints about testing and analysis 8 months after the tests were completed. *See,* for example, *Cadillac Gage Co.*, B-209102, July 15, 1983, 83-2 CPD ¶ 96. In fact, we note that in its initial protest letter the protester made only a general statement that the difference between its design and Scott's design in protection scores was statistically meaningless. ILC Dover waited almost 8 weeks longer—until it filed its comments on the Army report and a conference on its initial protest—to provide our Office and the Army any substantive statement on just why it believed the Army's analysis to be flawed. We dismiss this issue as untimely. 4 C.F.R. § 21.2.

In any event, the protester's arguments concerning the validity of the agency's testing and analysis boil down, in our view, to a disagreement over the concept of using laboratory data to predict battlefield results. While we would agree with Dover that there may not be a perfect correlation, we have no basis here to conclude that the agency acted unreasonably in using what it determined were the best testing and analysis methods available.

Were the Evaluation and the Award Decision in Accord With the RFP's Stated Scheme?

The evaluation of proposals is the function of the procuring agency, requiring the exercise of informed judgment and discretion. Our review is limited to examining whether the agency's evaluation was fair and reasonable and consistent with the stated evaluation criteria. We will question contracting officials' determinations concerning the technical merits of proposals only upon a clear showing of unreasonableness, abuse of discretion, or violation of procurement statutes or regulations. *KET, Inc.*, B-190983, Dec. 21, 1979, 79-2 CPD ¶ 429.

As the basis for award, the RFP stated: "The Government will select that mask which represents the best overall value to the Government, performance, cost and other factors considered." The RFP stated that proposals would be evaluated under three factors: (1) performance requirements—based upon the JSOR requirements and the assessment of Phase II and follow-on tests; (2) cost, including proposed price, maintenance and repair parts costs, warranty costs, and the costs of integrating certain planned product improvements; and (3) the offeror's production capability. The RFP listed eleven performance subfactors as follows:

A. Protection
B. Reliability, Availability and Maintainability (RAM)
C. Vision/Optical Coupling
D. Speech/Communication

The RFP stated: "Protection is significantly more important than any other of the above factors. All other factors are listed in descending order of importance."

The Army admits that its extensive testing revealed that ILC Dover's mask meets or exceeds the protection standards set out in the JSOR, but the Army stresses that it was not its intent to purchase masks that merely meet the JSOR minimum requirements. The Army argues that while ILC Dover's test results surpassed the JSOR standards, Scott's test results were superior to ILC Dover's in two critical areas: protection and RAM. The Army points out that the RFP reserved to the Army the right to award a contract to other than the lowest-priced offeror.

In selecting the Scott proposal, the Source Selection Authority offered the following rationale:

> With regard to performance, the Scott Aviation candidate offers enhanced protection with resulting casualty reduction over the ILC Dover candidate. In the area of production both prospective contractors were assessed as having the capability to produce their respective designs. Finally, with regard to cost, the Scott Aviation mask was found to have a higher proposal price than the ILC Dover mask; however, the enhanced protection offered by the Scott Aviation candidate, with the resultant reduced chemical casualties, outweighs the proposal price advantage offered by the ILC Dover candidate.

The Army argues that the primary mission of the mask selected is protection of soldiers and that the superiority of the Scott mask in protection and RAM will allow it to fulfill that mission much better than the ILC Dover mask. Specifically, the Army determined that the probability that a Scott mask would successfully complete a 72-hour mission was 98.5 percent compared to ILC Dover's 98.0 percent probability of a successful mission. The Army also predicted that ILC Dover's mask would suffer 33.3 percent more failures than Scott's mask (20 failures per 1,000 masks for ILC Dover compared to 15 failures per 1,000 masks for Scott) and that Scott's mean time to repair was just 1.8 minutes compared to ILC Dover's 4.2 minutes. Based upon the RAM data and the protection factor results, the Army concluded that there would be approximately twice as many casualties incurred if the ILC Dover mask was purchased instead of the Scott mask. For the 300,000 masks purchased under the basic contract, the Army calculates that ILC Dover's mask will have 1500 more life threatening failures than the Scott mask. Thus, the Army believes its decision to pay more for the Scott design is justified.

As indicated above, the RFP stated that proposals would be evaluated in three areas: (1) technical/performance against the JSOR requirements; (2) offeror's production capability and (3) cost. The RFP gave no indication that any one of

these factors would be considered more important than any other. Our Office has held that where the solicitation informs offerors that the evaluation will consider certain factors for award purposes, absent any indication in the RFP that the factors will be given other than equal consideration, the factors are to be considered substantially equal in weight. *University Research Corp.*, B-196246, Jan. 28, 1981, 81-1 CPD ¶ 50.

We do not believe the Army considered all three evaluation factors equally; therefore, the Army's evaluation was not in accord with the RFP's stated scheme. The Army's decision to award to Scott clearly gave paramount weight to the protection and RAM subfactors of the technical/performance factor at the expense of the cost and production capability factors.

In nine of the eleven technical/performance subfactors, the Scott and ILC Dover proposals were rated exactly even. That is, each proposal received 45 evaluation points (out of a possible 90) and was rated "satisfactory." Thus, the only differences in the proposals under the technical/performance factor were in the protection and RAM subfactors. Admittedly, these two subfactors were identified by the RFP as the two most important technical/performance subfactors, with protection identified as significantly more important than any other subfactor. The evaluation record shows that Scott's mask was rated at 8 on a 10-point scale for protection (clearly surpassing the JSOR requirements), while ILC Dover's mask was rated at 6 (also exceeding the JSOR requirements). In the RAM evaluation, Scott's mask was rated at 7 (again, clearly surpassing the JSOR requirements), while ILC Dover's mask was rated at 6 (exceeding the JSOR requirements). We note that one of the evaluators would have given ILC Dover's mask a RAM score of 7; he wrote a minority narrative on RAM in which he stated, "The operational reliability of the ILC mask . . . is so high that it must be pointed out as providing a significant operational advantage." Thus, Scott's overall rating in all technical/performance subfactors was 60 points, to 57 points for ILC Dover. It is clear that both mask designs surpassed the JSOR standards by wide margins under all significant protection criteria. Even the Army's own independent evaluation of the test results states that neither the Scott nor the ILC Dover design has any major deficiencies.

With respect to the evaluation factor for production capability, the Source Selection Authority concluded that both Scott and ILC Dover would be able to produce the required number of protective masks within the proposed contract schedule. However, the evaluators expressed concern about Scott's manufacturing plan and its facilities. Basically, the evaluators were concerned because Scott proposed to manufacture its masks at a plant that had been empty for 2 years, had no equipment in place, and needed major repairs. The evaluators also noted that Scott's manufacturing plan lacked sufficient detail. After allowing Scott to provide supplemental information about these perceived deficiencies, the Army's evaluators were satisfied that Scott probably would be able to meet the production schedule. The evaluators concluded, however, that Scott's proposal contained "medium" risk, while ILC Dover's proposal was rated "low"

in risk assessment. Thus, the ILC Dover proposal was rated as slightly superior to the Scott proposal under this evaluation factor.

Finally, in the cost area, ILC Dover's proposal was much lower than Scott's proposal. ILC Dover proposed a fixed price of $35,019,750 for the contract quantity, while Scott proposed a fixed price of $51,823,181; thus Scott's proposed price was $16,803,431, or about 48 percent, more than ILC Dover's proposed price. Even after the Army added the costs of maintenance, spare parts, and product improvements over the 10-year life of the masks, ILC Dover's total cost was calculated to be only $51,354,660, while Scott's total cost was $68,470,980. Accordingly, using the Army's own figures, Scott's masks will still cost about $17,116,320, or approximately 33 percent, more than ILC Dover's masks. Thus, ILC Dover's proposal was significantly superior in this evaluation area.

Conclusion

Our review of all the evaluation materials shows ILC Dover's proposal to be much lower in the cost area, slightly better under the production capability factor, and only slightly inferior under the technical/performance factor. In accord with the RFP's evaluation scheme, all three of these factors were to be considered equal in selecting a proposal for award. Because the Army's selection decision was not based on the RFP evaluation scheme, we sustain the protest.

Clearly, the Army has determined that RAM and protection are critical to selection of the appropriate mask design and it wants to purchase a mask that exceeds the JSOR requirements by as much as possible. In fact, the selection of the Scott design effectively was preordained by the results of the Phase II testing; it would seem that ILC Dover never really had a chance to win the competition given its design.[1] A reopening of the competition based on the ILC Dover design therefore would serve no useful purpose. In these circumstances, ILC Dover is entitled to recover its proposal preparation expenses as well as the reasonable costs of filing and pursuing its protest. *See* 4 C.F.R. § 21.6(e).

The record is clear that the Army always has intended to obtain competition based on the winning design. Therefore, and in view of the statutory mandate for full and open competition, we are recommending by letter of today to the Secretary of the Army that the Army terminate Scott's contract for the convenience of the government and procure its requirements on a competitive basis using the Scott design and the revised technical data package.[2]

The protest is sustained.

---

[1] We recognize in this regard that the Army did not complete its analysis of the testing until well into the competition.

[2] In the determination and findings issued to support a limited competition (between Scott and ILC Dover) for this contract, the Army stated that the firm which designed the selected mask must produce an additional quantity of the masks in order to validate the technical data package and to verify production procedures, processes and techniques. However, we know of no reason why production by Scott, as opposed to any other competent contractor, is needed to provide it. This matter currently is the subject of a separate review by our Office.

B-227474.2, November 10, 1987

Procurement

Bid Protests
GAO Procedures
Protest Timeliness
Significant Issue Exemptions
Applicability

Request for reconsideration of untimely protest based on significant issue exception is granted and case decided on the merits where it is alleged by small business that it was denied opportunity to compete because agency failed to advise it of procurement under agency's previously established procedure.

Procurement

Sealed Bidding
Invitations for Bids
Competition Rights
Contractors
Exclusion

Protest of multiple award Federal Supply Schedule contractor, whose prior contract contained renewal clause, that it failed to receive notice of solicitation is denied where agency synopsized procurement in *Commerce Business Daily* and mailed solicitation to protester. Renewal clause confers no additional protection to protester.

Matter of: Radio Laboratories, Inc.—Reconsideration

Sinclair Radio Laboratories, Inc., requests that we reconsider our June 16, 1987, dismissal of its protest of the General Services Administration's (GSA) failure to advise it of solicitation No. GSC-KESV-000-44 covering antennas, duplexers and transmitter combiners.

In its initial protest, Sinclair stated that it had been supplying such items under GSA contracts since 1982, and contract renewal was always initiated by GSA. As an example, Sinclair noted that in 1986 GSA contacted it by letter, enclosing a standard form for executing a contract modification to renew the contract and directions for submitting a new offer to the solicitation if Sinclair did not wish to renew under existing terms. Sinclair stated it did not receive any communication from GSA during the spring of 1987 regarding contract renewal, and thus contacted GSA on May 13, 1987. GSA informed Sinclair that the time for submitting offers had expired in April, and that Sinclair's late offer would not be considered. Sinclair protested to our Office on June 15, complaining that GSA had not notified Sinclair of its intentions regarding renewal of Sinclair's contract, or that the closing date for offers was to be earlier in 1987 than it was in 1986.

We dismissed Sinclair's protest as untimely because Sinclair was advised by GSA on May 13 that its offer would not be considered, but did not protest GSA's actions to our Office until June 15. Our Bid Protest Regulations require that

such a protest be filed not later than 10 working days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1987). Since Sinclair's protest was not filed with our Office until June 15, 22 working days after it knew about the GSA conduct to which it objected, its protest was untimely.

In its request for reconsideration, Sinclair, a small business firm, argues that we should consider the merits of its protest, notwithstanding its untimely filing, under the significant issue exception of our Bid Protest Regulations, 4 C.F.R. § 21.2(c). Sinclair argues that it was prevented from competing for this procurement because GSA changed its renewal process of the past 5 fiscal years for this contract by not specifically notifying it that the contract would not be renewed. In effect, Sinclair contends that GSA owes a duty to small business incumbent contractors to directly notify them of solicitations being issued. Sinclair states it does not have the resources to have an employee monitor the CBD, as do larger firms, for solicitation announcements.

In order to assure that small business firms such as Sinclair are being treated fairly by GSA, we have considered the merits of the protest, and we deny the protest.

As noted above, Sinclair contends that beginning in 1982 it was awarded contracts with renewal provisions which GSA exercised. As to recent years, Sinclair was awarded a contract in 1985 for fiscal year 1986 under Group 58, Federal Supply Schedule (FSS). The contract provided for two 1 year renewals at the option of the government. As noted earlier. GSA renewed for fiscal year 1987 but did not renew for fiscal year 1988, instead issuing the instant solicitation. Sinclair contends that it relied to its detriment on what it terms was GSA's prior practice of sending renewal notices to Sinclair.

Instead of renewing the fiscal 1988 contract, the solicitation was synopsized in the *Commerce Business Daily* (CBD) on February 4, 1987, and again on February 23, 1987, to make a minor correction. The notice provided that the solicitation would be issued on March 10, 1987, with a closing date of April 23, 1987. GSA's records show that it mailed the solicitation to 177 firms on the bidder's list, including Sinclair, at its proper address. More than half of the firms which were mailed the solicitation submitted offers for the multiple award contract.

GSA reports that there is no standard practice of renewing contracts since each decision to renew, like the exercise of an option, is within the discretion of the agency. Since GSA had determined not to renew the contracts under this schedule, but receive new bids, it contends that there was no reason or procedure for GSA to contact Sinclair. Moreover, GSA points out that Sinclair was awarded a similar contract for fiscal year 1984, which GSA renewed for fiscal year 1985, but did not renew for fiscal year 1986. However, Sinclair did submit a timely offer for fiscal year 1986, which resulted in a contract. Finally, GSA notes that although Sinclair does not have a schedule contract for fiscal year 1988, it is not precluded from selling to the government as the schedule contracts involved

here are not mandatory and government agencies utilize their own mailing lists and CBD announcements when acquiring communication equipment.

While our Office has recognized that the Competition in Contracting Act of 1984 (41 U.S.C. § 253(a)(1)(A) (Supp. III 1985)) requires agencies to obtain full and open competition, we have also found that an agency has satisfied the requirement for competition when it makes a diligent, good faith effort to comply with the statutory and regulatory requirements regarding notice of the procurement and distribution of solicitation materials and it obtains a reasonable price. The fact that all possible bidders or offerors do not compete does not require corrective action. *NRC Data System* , B-222912, July 18, 1986, 65 Comp. Gen. 735, 86-2 CPD ¶ 84.

Here, we find GSA has satisfied this standard. GSA complied with the synopsis requirements and sent the solicitation to all bidders on its bidders mailing list, including Sinclair, in accordance with its standard practice. The fact that Sinclair's prior contract contained a renewal clause conferred no greater obligation on GSA to contact Sinclair. To require more than was done here by GSA, which awards dozens of multiple award contracts, involving hundreds of contractors, would be impracticable.

The protest is denied.

B-228934, B-228934.3, November 10, 1987

Procurement

Sealed Bidding
Unbalanced Bids
Materiality
Responsiveness

The apparent low bids for a contract contemplating award for a 1-year base period and four 1-year options are mathematically unbalanced where there are price differentials of 107 percent and 51 percent, respectively, between the base year bids and the fourth option year bids and the price differential between bid performance periods is attributable primarily to the bidders' discretionary decision to complete paying for equipment in the early years of contract performance. Since the agency has a reasonable doubt that the acceptance of those bids which do not become low until the fourth and fifth years of the contract ultimately would result in the lowest overall cost to the government, the bids properly are rejected as materially unbalanced.

Matter of: Professional Waste Systems, Inc.; Tri-State Services of Texas

Professional Waste Systems, Inc. (PWS), and Tri-State Services of Texas (TSS) protest the rejection of their bids as materially unbalanced under invitation for bids (IFB) No. DABT10-87-B-0065, issued as a 100 percent small business set-aside by Fort Benning, Georgia. The procurement is for the acquisition of all labor, supervision, facilities, tools, materials, equipment, containers and vehicles for collection and transportation of refuse at Fort Benning and the disposal of

refuse in the Fort Benning landfill, including operation and maintenance of the landfill.

We deny the protests.

The IFB provided for award of a 1-year base period covering fiscal year 1988 with four 1-year option periods. The IFB incorporated by reference the Federal Acquisition Regulation (FAR) clause found at 48 C.F.R. § 52.217-5 (1986), entitled Evaluation of Options, which advised bidders that the government would evaluate bids on the total price for the base requirement and all options and further advised that the government could reject an offer as nonresponsive if it were materially unbalanced as to prices for the basic requirement and the option quantities.

On July 30, 1987, the procuring agency received and recorded 10 bids. The first four bids were as follows (rounded):

	Base Year	OP YR 1	OP YR 2	OP YR 3	OP YR 4	TOTAL
PWS	996,744	711,336	693,324	474,936	480,936	3,357,276
MMI*	1,010,040	1,010,040	497,652	497,652	497,652	3,513,036
TSS	886,673	840,408	828,540	642,810	587,136	3,785,567
MDI*	780,000	780,000	780,000	780,000	780,000	3,900,000

*MMI - Midland Maintenance Inc.
*MDI - Mark Dunning Industries, Inc.

On August 4, the contracting officer wrote to PWS, MMI and TSS concerning the significant variance between their bid prices for the base year and their prices for the option years. The contracting officer asked each bidder to examine its bid for mistakes and possible unbalancing. In the event that bidders chose to confirm their bid, the contracting officer asked for an explanation of the apparent disparity in prices for the base contract period and option years, as well as worksheets and other supporting documents. All three contractors verified their bid prices.

PWS submitted cost data indicating that costs for the basic and first two option years were increased by loan payments of $425,148 in the base year and $169,464 in each of the first and second option years. TSS explained that its base year price included purchase of additional equipment and that other equipment would be obtained by a 3-year lease-purchase plan, costs of which would not be incurred in the fourth or fifth year of contract performance. TSS advises that a 3-year plan saved $128,000 over a 5-year plan.

On August 20, the contracting officer advised the three low bidders that he was rejecting their bids as materially unbalanced and, consequently, nonresponsive. All three bidders protested the rejection of their bids; MMI withdrew its protest apparently in response to a challenge to its small business size status. Award was made to MDI.

The contracting officer's decision to reject the bids of PWS and TSS as materially unbalanced is without legal objection if (1) the bids are in fact mathematical-

ly unbalanced and (2) the contracting officer had a reasonable doubt that award to either PWS or TSS would result in the lowest overall cost to the government. *Howell Construction, Inc.*, B-225766, Apr. 30, 1987, 66 Comp. Gen. 413.

An examination of bid unbalancing has two aspects. First, the bid must be evaluated mathematically to determine whether each item carries its share of the cost of the work specified for that item as well as overhead and profit. If the bid is based on nominal prices for some of the work and enhanced prices for other work, it is mathematically unbalanced. The second part of the test is to evaluate the bid to determine whether award to a bidder that has submitted a mathematically unbalanced bid will result in the lowest overall cost to the government. If award to a party that submits a mathematically unbalanced bid will not result in the lowest overall cost to the government, the bid is materially unbalanced and cannot be accepted. *Landscape Builders Contractors*, B-225808.3, May 21, 1987, 87-1 CPD ¶ 533.

With regard to service contracts that involve evaluation of a base period and option periods, as in the instant case, we have held that a bid will be questioned where in terms of the pricing structure evident among the base and option periods it is neither internally consistent nor comparable to the other bids received. We have recognized that a large price differential between base and option periods, or between one optional period and another, may be *prima facie* evidence of mathematical unbalancing. *See Howell Construction, Inc.*, B-225766, *supra.*

The record shows that PWS' base year bid is 107 percent higher than its bid for the fourth option year; TSS' base year bid is 51 percent higher than its bid for the fourth option year. PWS' base year bid is higher than its third and fourth year option year bids added together; half of its total bid appears in the base and first option year. While five bidders including PWS and TSS submitted front-loaded bids, five others offered level pricing for the base year as well as the options.

Further, as far as PWS' bid is concerned, we have held much smaller differentials to indicate by their very magnitude that the bid is mathematically unbalanced. *See Howell Construction, Inc.*, B-225766, *supra*, (85 percent) and *USA Pro Company, Inc.*, B-220976, Feb. 13, 1986, 86-1 CPD ¶ 159 (90 percent).

Both PWS and TSS proffer explanations related to contract financing to explain their bidding patterns. TSS has acknowledged that it could have negotiated a 5-year lease purchase plan but that the 3-year plan saved $120,000, almost precisely the difference between TSS' total bid price and that of MDI. Both bidders' explanations indicate that the pricing differential relates to financing considerations and not to differences in work or the cost of work. Both explanations are based on the bidders' business judgments, but it is not our practice to look behind a bid to ascertain the business judgments that went into its preparation. *Crown Laundry and Dry Cleaners, Inc.*, B-208795.2, B-209311, Apr. 22, 1983, 83-1 CPD ¶ 438. Based on their pricing of the base year and options years, we conclude that the PWS and TSS bids are mathematically unbalanced.

As noted above, a bid is materially unbalanced if there is a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will result in the lowest ultimate cost to the government. *Howell Construction, Inc.*, B-225766, *supra*. For a long time, our material unbalancing analysis was limited to determining whether the government reasonably expected to exercise the options. *See*, for example, *Jimmy's Appliance*, 61 Comp. Gen. 444 (1982), 82-1 CPD ¶ 542. If the exercise was reasonably anticipated, we concluded that the bid was not materially unbalanced. However, in cases involving extreme frontloading and where the mathematically unbalanced bid does not become low until the end of the final option year, we have indicated that, despite the initial intent to exercise the options, intervening events could cause the contract not to run its full term, resulting, therefore, in inordinately high cost to the government and a windfall to the bidder. Under this type of factual situation, we have held that there was a reasonable doubt whether the mathematically unbalanced bid would ultimately provide the lowest cost to the government. *Applicators, Inc.*, B-215035, June 21, 1984, 84-1 CPD ¶ 656.

The record shows that the TSS bid does not become low when compared to the bid of the awardee, MDI, until the last option year and the PWS bid does not become low until the fourth year. On these facts, therefore, we conclude that the Army had sufficient reasonable doubt that acceptance of the PWS and TSS bids would actually provide the lowest cost to the government. *See Lear Siegler, Inc.*, B-205594.2, June 29, 1982, 82-1 CPD ¶ 632.

In the instant case, the contracting officer points out several possibilities that could preclude option exercise. The agency indicates that the existing landfill may be filled within the next year and require use of another landfill. Also, the Army points out that troop transfers may cause a decrease in refuse volume. As PWS points out, the contracting officer is required to make a determination prior to evaluating options and prior to using the FAR, § 52.217-5 clause, that there is a "reasonable likelihood" that options will be exercised and that these factors were considered by the Army and not seen as problems when issuing the IFB with the Evaluation of Options clause. However, even if we assume, as PWS and TSS contend, that the Army at the present time expects to exercise the options under the contemplated contract, that still does not obviate the correctness of the determination made here to reject PWS' and TSS' bid as materially unbalanced. *See Howell Construction, Inc.*, B-225766, *supra*.

We deny the protests.

B-214459, November 12, 1987

Appropriations/Financial Management

Claims Against Government
■ Burden of Proof
■■ Factual Issues

Claims or demands against the government which seek payment for supplies or services sold to it must be accompanied by adequate evidence of delivery to or acceptance by an appropriate government official of the goods or services at issue.

Appropriations/Financial Management

Claims Against Government
■ Burden of Proof
■■ Factual Issues
■■■ Credit Cards

When settling oil company credit card claims against the United States, conducting audits, or prosecuting false or fraudulent credit card claims, the government needs to be able to satisfy itself, based on the "documents" which evidence those transactions, that an authorized individual used a valid card to properly service or supply an official vehicle engaged on official business.

Appropriations/Financial Management

Claims Against Government
■ Burden of Proof
■■ Factual Issues
■■■ Credit Cards

Oil companies participating in the United States Government National Credit Card Program (SF-149) may be permitted to adopt new technologies which result in the elimination of signed paper "delivery tickets" (e.g., credit card charge receipts), if appropriate auditing and accounting controls are maintained and the government's ability to settle claims, conduct audits, and litigate false and fraudulent claims, are otherwise adequately protected.

Appropriations/Financial Management

Claims Against Government
■ Burden of Proof
■■ Factual Issues
■■■ Credit Cards

The United States Government National Credit Card Program (SF-149) should be modified to require users of the SF-149 credit card to tender their government "ID" along with the SF-149, so that the station operator can verify the user's name and official status.

Matter of: United States Government National Credit Card

In a letter of August 15, 1986, the Comptroller of the General Services Administration (GSA) sought our opinion of an oil company proposal affecting the payment of invoices against the United States arising from use of the United States Government National Credit Card (SF-149). Presently, oil companies are required to submit along with the company's invoice signed "delivery tickets" (i.e.,

credit card charge receipts) from persons who use SF-149 credit cards. The proposal would eliminate the requirement that charge receipts be submitted with company billings. As explained below, we cannot endorse eliminating the requirement for oil companies to obtain and preserve adequate documentation of the sale of company supplies or services (whether paper or electromagnetic) which serves the function presently served by signed paper delivery tickets. Nevertheless, so long as the government's interests are adequately protected, the oil companies may be permitted, in the exercise of sound discretion, to adopt technological alternatives to the traditional paper delivery ticket system.

The SF-149 Program[1]

The SF-149 is a credit card issued by GSA which may be used by authorized government officials and employees to make credit purchases of fuel, supplies, and services (for government vehicles engaged on official business) from commercial oil company retailers who participate in a series of procurement contracts issued and administered by the Defense Fuel Supply Center (DFSC). 41 C.F.R. § 101-26.406-1 (1983). The standard terms of the DFSC contracts presently provide that the oil companies are entitled to be paid "upon submission of proper invoices for supplies and/or services rendered and accepted." DFSC Bulletin DSA600-3.33, Clause No. L159(a). When submitted, the contractors' invoices must be accompanied by "delivery receipts" (traditionally paper documents) which show: name and address of the service station and date of delivery; item, quantity, and grade of product, other supplies or service delivered; unit price with extended totals; license tag or identification number of the vehicle; and signature of the credit card user, acknowledging receipt of delivery. Clause No. L158(a).

The Oil Company Proposal

GSA's submission states:

> The DFSC has notified us [GSA] that the Exxon Company, and other major petroleum suppliers, intend to automate the processing of credit card transactions. The installation of electronic terminals, at selected service stations, will allow for an on line electronic processing of credit card transactions to a contractor Credit Card Center. Within the system, *a delivery ticket may or may not be provided* depending on the type of terminal in use at the service station. When available, the original ticket will be given to the purchaser, and a copy retained by the seller. *No paper ticket will be sent to the Credit Card Center, nor will any delivery tickets be furnished with the Contractors' invoices.*
>
> Heretofore, in accordance with established government contract payment provisions, the credit card receipt has served as a receiving report. Since the *delivery tickets will no longer be available for inclusion with Contractors' invoices,* the Exxon Company has specifically asked that the delivery ticket submission requirement be amended for future service station contracts. [Italic supplied.]

Consequently, DFSC asked GSA whether it (or other agencies) would object to elimination from future SF-149 program contracts of the requirements for obtaining and submitting paper delivery tickets. GSA, in turn, asked whether

---

[1] This program is described in greater detail in 64 Comp. Gen. 337 (1985).

GAO would object to the payment of oil company invoices under those circumstances. In order to better understand and resolve GSA's questions, we informally consulted with the GSA and DFSC staff who administer the SF-149 program.

Discussion

When settling oil company credit card claims or demands against the United States, auditing program operations, or prosecuting unauthorized or fraudulent credit card claims, the government needs to be able to satisfy itself, based on the "documents" which evidence those transactions, that an authorized individual used a valid card to properly service or supply an official vehicle engaged on official business. 64 Comp. Gen. 337 (1985). In this regard, the government's accounting officers have long held that claims for payment of supplies or services sold to the government must be accompanied by evidence of delivery to or acceptance by an appropriate government official of the goods or services at issue.[2] An early application of this rule to oil company credit card transactions may be found in A-49009, Nov. 24, 1950, in which this Office advised an oil company that:

> . . . an invoice or bill in summary form signed and certified to by the vendor, or an authorized representative, and supported by the original or copy of the delivery tickets bearing the signatures of the individuals making the purchases, properly executed as to unit prices and taxes, will meet with the audit requirements of this Office.

Consistent with this longstanding rule, DFSC's previous oil company contracts have required service station operators to obtain and submit to the government copies of signed paper "delivery tickets." Clause No. L158(a). However, Exxon and other companies now wish to use "electronic terminals" which, GSA understands, "may or may not" result in the creation of signed delivery tickets. Moreover, GSA understands that even if the new systems do provide delivery tickets to the purchasers, "no paper ticket will be sent to the Credit Card Center, nor will any delivery tickets be furnished with [those companies's] invoices."

As a general principle, we conclude that GSA and DFSC (as the administrators of the SF-149 program) have the discretion to allow the oil companies to take advantage of new technologies. At the same time, however, we also conclude that, before the government agrees to significant changes to the SF-149 program, such as eliminating the requirement for oil companies to obtain and submit paper delivery tickets, it is absolutely essential that GSA and DFSC assure that the government's audit requirements and other interests in this area will be adequately protected. Putting it another way, before agreeing to any significant change, GSA and DFSC must determine whether implementing the proposal would unreasonably interfere with or eliminate auditing and accounting controls and procedures which are necessary to protect the government's interests in the SF-149 program.

[2] *E.g.*, 3rd Ed. Digest Dec. Second Comp. at 63, Para. 445 (1869) (re 23 Second Comp. Dec. 221) (re 23 Comp. Dec. 221); Digest Dec. Comp. 243 (1902) (re 7 MS Comp. Dec. 1225) and 8 MS Comp. Dec. 570.

Based largely upon the suggestions and comments made by the GSA and DFSC staff during our informal consultations, it is our view that, whatever changes are made by GSA and DFSC, the following types of auditing and accounting controls and procedures should be retained in the SF-149 program, unless DFSC and GSA properly determine that other controls or procedures would adequately assure that the transactions billed are proper:

(1) There should be adequate "documentation" (whether on paper, or through some acceptable electromagnetic or other means) that the government, through its agent, officer, or employee, received the goods or services for which the government is being billed. This "documentation" will normally include (A) the number of the credit card used; (B) the identification number of the vehicle serviced or supplied; (C) the date of transaction; (D) the purchased item, quantity, grade or product, supplies, services, etc.; (E) the unit and total price; (F) the service station at which the transaction occurred; (G) an acknowledgement, whether express or implied, by the credit card user of (i) receipt of the goods or services billed and (ii) the particular details listed above; (H) the credit card user's identity in the form of the user's name, or some other identifier of the user (such as the user's social security or government identification number), and the presence of the user's signature or some other mark, symbol, device, or confidential code number which is unique to the user and thereby proves the user's participation in the transaction.

(2) Invoices submitted by oil companies under the SF-149 program, whether in the form of paper or some electromagnetic medium, should be required to specify for each transaction billed, if reasonably possible, the user's identity, the credit card number, the vehicle identification number, the date of the purchase, and the transaction price, as well as the service station where the purchase occurred.

(3) If an oil company does not submit to the government along with its invoices its portion of the "documentation" described in paragraph (1), the company should be required to preserve that documentation for a period of time which is consistent with applicable retention schedules by some acceptable and legible means which facilitates ready access, location, and examination of either particular transactions, or particular groups of transactions retrievable in the following categories: (A) purchaser, (B) vehicle identification number, (C) credit card number, (D) service station, (E) date of transaction, and (F) any other categories which DFSC and GSA find desirable.

(4) The oil company should be required to provide to the government, within a reasonable period of time, any documentation requested by the government.

(5) Agencies should be required to establish and follow satisfactory auditing and accounting controls and procedures which are calculated to assure the reliability of invoices submitted to the government and records maintained by the oil companies (including, for example, the preservation of documentation, and the fact and authenticity of the transactions billed to the government).

We are aware that there are emerging technologies in the credit card industry, and various configurations of those technologies. We do not present the preceding listing as an absolutely rigid formula from which there may be no deviation under any of the technological variations. If anything is rigid, it is the overall responsibility of those administering the program to assure that the payment system used adequately protects the government's interests. Any payment system must provide reasonable assurances that the government is being asked to pay only that which it is properly obligated to pay, and must include the capability of verification through audit. Within this broad prescription, the precise details of the payment system to be used under a given technology are to be worked out in the first instance by the agencies responsible for administering the program. Under any system, the primary question is not whether some particular piece of information is included or how it is recorded, but whether that system, in relation to the technology, is reasonably adequate to meet the government's objectives.

In addition, we strongly recommend to GSA and DFSC that the SF-149 program be modified to require credit card users to tender their government "ID" along with the SF-149, so that the station operator can verify the name and official status of the credit card user. In this regard, this Office has observed on several occasions that:

> . . . The possession of a credit card, or of the official car identified thereon, in itself alone, does not justify an extension of credit to the bearer as a representative of the United States. *The service station employees to whom such cards are presented should require competent evidence as to the identity and official status of the persons holding them.* All Federal employees authorized to use official cars and purchase gasoline and oil on the credit of the Government have available means of readily establishing these facts. 64 Comp. Gen. 337, 342 (1985) [Italic supplied.] *quoting,* 23 Comp. Gen. 582, 583 (1944) *and* 32 Comp. Gen. 524, 525 (1954).

Since the government will not pay for SF-149 transactions made by unauthorized users,[3] it is clearly consistent with the best interests of both the government and the oil companies to implement these requirements and recommendations.

In summary, DFSC and GSA have the discretion to allow oil companies to take advantage of new technologies, including the elimination of paper delivery tickets, so long as the government's interests in settling claims, conducting audits, and litigating false and fraudulent claims are otherwise adequately protected.

---

[3] *E.g.,* 64 Comp. Gen. 337, *supra.*

B-228744, November 12, 1987

Procurement

Competitive Negotiation
■ Requests for Proposals
■■ Competition Rights
■■■ Contractors
■■■■ Exclusion

Procuring agency which misclassifies advertisement in the *Commerce Business Daily* (CBD) has failed to effectively notify firms most likely to respond to a pending procurement and, therefore, violated the Competition in Contracting Act of 1984 (CICA) requirements to obtain full and open competition.

Matter of: Frank Thatcher Associates, Inc.

Frank Thatcher Associates, Inc., protests the procedures followed by the Forest Service, United States Department of Agriculture, in soliciting proposals to conduct a microwave feasibility study under request for proposals (RFP) No. R3-87-30. Thatcher maintains that it was excluded from competition due to misclassification in the *Commerce Business Daily* (CBD) of the notice advertising this procurement. We agree, since the misclassified notice failed to effectively notify those firms most capable of responding to this procurement such that the Forest Service failed to obtain "full and open competition" as required by the Competition in Contracting Act of 1984 (CICA). The protest is therefore sustained.

Congress has statutorily mandated that agencies notify potential offerors of pending procurements through publication of an announcement in the CBD. 15 U.S.C. § 637(e) (Supp. III 1985); 41 U.S.C. § 416 (Supp. III 1985). The regulations implementing those statutes require that the agency must specify the appropriate classification under which the CBD notice will be published. Federal Acquisition Regulation, 48 C.F.R. § 5.207 (1986).

Here, the request for contract action on which the CBD notice was based called for a feasibility study to develop specifications for procurement of the microwave portion of national forest radio systems. The Forest Service states that a procurement clerk handling the request incorrectly concluded that equipment would be purchased under the planned solicitation. Accordingly, the clerk requested that the notice advertising the procurement be published in the CBD in the section headed "Supplies, Equipment and Material." The notice appeared in the CBD on May 8, 1987. The Forest Service acknowledges that the notice was misclassified and should have been published in the CBD section headed "Services."

The Forest Service issued the RFP on June 26, 1987 and established a closing date of July 27. Thatcher indicates that it did not learn of the pending procurement until after the closing date.

Thatcher bases its protest on the fact that it is a consulting engineering company which only provides professional services, not supplies, equipment or material. As such, it does not review all CBD notices published daily, since a typical

copy of the publication has more than 60 pages and 1,200 notices. Thatcher argues that, due to the misclassification, it and other consulting firms were not notified of the pending procurement and thus were precluded from submitting proposals.

In responding to the protest, the Forest Service argues that, despite the misclassification, the protest should be denied because the misclassification was inadvertent, adequate competition was obtained,[1] and award was made at a reasonable price. The Forest Service relies on decisions of our Office— decided prior to CICA—in which we denied protests concerning misclassified CBD notices where the agency attempted to notify offerors, there was no deliberate attempt to exclude the protester, and award was made at a reasonable price. *E.g., Morris Guralnick Associates, Inc.* B-214751.2, Dec. 3, 1984, 84-2 CPD ¶ 597 (concerning a virtually identical situation where a CBD notice for a services contract was improperly classified under "supplies, equipment and material" instead of "services "); *Hartridge Equipment Corporation,* B-209061, Mar. 1, 1983, 83-1 CPD ¶ 207. As discussed below, enactment of CICA has placed a greater burden on agencies to take positive, effective steps towards ensuring that all responsible sources are permitted to compete.

Since April 1, 1985, the effective date of CICA, agencies have been required to "obtain full and open competition through the use of competitive procedures." 41 U.S.C. § 253(a)(1)(A) (Supp. III 1985). "Full and open competition" is defined as meaning that "all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement." 41 U.S.C. §§ 259(c) and 403(7) . The legislative history of CICA reveals that Congress established "full and open" competition as the newly required standard because of its "strong belie[f] that the procurement process should be open to *all* capable contractors who want to do business with the government." [Italic supplied.] H.R. Rep. No. 861, 98th Cong., 2d Sess. 1422 (1984). In view of this clear statement of the government's policy and the clear expression of Congress' intent that a new procurement standard—"full and open" competition—will govern, our Office must give careful scrutiny to the allegation that potential offerors have not been provided an opportunity to compete for a particular contract. *Dan's Moving & Storage, Inc.,* B-222431, May 28, 1986, 86-1 CPD ¶ 496; *Trans World Maintenance, Inc.,* 65 Comp. Gen. 401 (1986), 86-1 CPD ¶ 239.

Our Office has held that under CICA, an agency's failure to synopsize pending procurements in the CBD in a manner reasonably expected to provide potential offerors with actual notice of the pending procurement violates CICA's requirement to obtain full and open competition. *Pacific Sky Supply, Inc.,* B-225420, Feb. 24, 1987, 87-1 CPD ¶ 206; *Reference Technology, Inc.,* B-222487, Aug. 4, 1986, 86-2 CPD ¶ 141. Specifically, in *Reference Technology,* we considered a situation where an agency published a CBD notice omitting certain specific items to be procured. In that case, the protester, and firms like it, had no reason to know of the pending acquisition of the omitted items since those firms produced only the

[1] Solicitation packages were mailed to firms on the agency's mailing list as well as firms specifically requesting the material. A total of 51 solicitations were mailed and 6 offers were received.

omitted items, and not the items publicized. We concluded that despite the agency's good faith effort to publicize the procurement, it had not complied with CICA's requirement to obtain full and open competition.

Similarly, we believe that here, due to the misclassification, the Forest Service failed to effectively notify and solicit those firms most likely to respond to the solicitation, that is, those firms specializing in providing the type of services the Forest Service sought. In situations such as this, CICA requires an agency to go beyond mere attempted notification of potential offerors. Under CICA, an agency must take positive, effective steps towards ensuring that all responsible sources are permitted to compete, and may not justify its failure to succeed by relying on its efforts rendered ineffective by its own mistakes. Further, in this instance, the Forest Service could have easily verified whether the CBD notice was properly published and taken corrective action prior to issuance of the RFP, since the misclassified notice appeared on May 8, and the RFP was not issued until June 26.

Accordingly, we conclude that in causing the misclassification of the CBD notice, the Forest Service failed to effectively notify that segment of potential offerors most likely to respond, and thereby violated CICA's requirement to obtain full and open competition.

The protest is sustained.

We are unable to recommend resolicitation of this procurement since we understand that the contract has been substantially performed.[2] As a result we find that Thatcher is entitled to recover its costs of filing and pursuing this protest. 4 C.F.R. § 21.6(e). The protester should file its claim for costs directly with the contracting agency. 4 C.F.R. § 21.6(f).

B-220542, *et al.*, November 16, 1987

Civilian Personnel

Travel

■ Bonuses

■■ Acceptance

■■■ Propriety

Five AID employees traveling on official business participated in airline frequent flyer programs and earned free tickets which they used for personal travel. AID found the employees liable for the value of the tickets used and the employees appeal. Decisions of the Comptroller General have consistently applied the rule that airline promotional mileage credits earned on official travel may only be used for official travel and may not be used by employees for personal travel. Thus, the employees are liable for the full value of the tickets. Erroneous advice of agency officials cannot defeat application of the rule.

[2] The Forest Service has provided our Office with written notice of its determination that urgent and compelling circumstances existed which did not permit awaiting our decision on this matter. Accordingly, contract performance was begun, notwithstanding the pendency of this protest, as permitted by statute and regulation. 31 U.S.C. § 3553(d)(2) (Supp. III 1985); 4 C.F.R. § 21.4(b)(2) (1987).

Travel
■ Bonuses
■■ Acceptance
■■■ Propriety

The rule requiring an employee to account for airline promotional material earned on official travel applies to benefits such as accommodation upgrades to business class or first class when they are obtained in exchange for mileage credits. Therefore, an employee may not exchange mileage credits for accommodation upgrades absent authorization or approval by the appropriate agency official. 63 Comp. Gen. 229 (1984) clarified. The restrictions on the use of first-class travel contained in FTR para. 1-3.3d now apply to upgrades obtained in exchange for mileage credits, but could be revised in order to maximize the integration of airline incentive programs into agency travel plans. Collection of the value of the unauthorized or unapproved upgrades used prior to this decision is not required.

Matter of: Michael Farbman, *et al.*—Personal Use of Airline Promotional Material

Five employees of the Agency for International Development (AID) appeal that agency's determination that they are liable for the use for personal travel of airline promotional mileage credits earned on official travel. The appeals are denied and the employees remain liable for the value of the personal trips, notwithstanding that such use was approved by agency officials and that the employees may have used the airline mileage credits prior to learning of regulatory and decisional authorities prohibiting such use.

Each of the five AID employees utilized airline mileage credits earned on official government travel to obtain free airline tickets for themselves, and in several cases their dependents, for personal travel. The trips that the employees or members of their families took and the amounts of the resulting indebtedness are as follows:

Michael Farbman: Indebted for $2,070 representing the value of tickets issued to Susan Farbman for travel from Washington, D.C., to San Juan, Puerto Rico, and return during September 1983.

Martin J. Forman: Indebted for $6,020 representing the value of tickets issued for the travel of his daughter from Washington, D.C., to Nairobi, Kenya, and return in October 1984; the travel of his wife from Washington, D.C., to Geneva and return in February 1985; and the travel of his wife from Washington, D.C., to Geneva and Rome and return during February 1986.

Leo L. LaMotte: Indebted for $5,592 representing the value of tickets issued for his and his wife's travel from Washington, D.C., to Tokyo, Hong Kong and Singapore, and return during December 1983.

John I. McKigney: Indebted for $2,764.77 representing the value of tickets issued to Mrs. John McKigney for travel from Washington, D.C., to Tokyo, Singapore, and Hong Kong and return during October and November 1983.

Eugene S. Staples: Indebted for $2,274.90 representing the value of tickets issued to Suzanne Staples for travel from Washington, D.C., to Tokyo and Manila and return during August 1983.

These employees' use of the airline promotional awards was discussed in our report "Use of Airline Bonus Awards by AID Employees," NSIAD-86-217, B-220542, September 26, 1986.

The AID employees contend that they should not be held liable for the value of the personal trips. Although based on slightly different premises, the essence of each employee's argument is that he was unaware of the prohibition against personal use of airline mileage credits earned on official travel and that he acted in good faith. Messrs. LaMotte and Staples state that they consulted AID's Office of the General Counsel and other agency officials before converting the airline mileage credits to their personal use and were advised that it would not be contrary to AID policy to accept free travel since AID would not be able to use the tickets. AID supports the employees, contending that the rules regarding the use of airline promotional material were unclear at the time the travel was performed.

While we do not question the good faith of the AID employees or the agency, we cannot agree that their lack of knowledge provides a basis for not holding them liable for personal use of promotional benefits earned on government travel. A brief review of the history of the applicable rule shows that the prohibition against an employee's use of airline mileage credits for personal travel has been applied consistently by this Office to prohibit such use. The basis for the rule was stated in a July 15, 1981 decision, *Gifts or Prizes Acquired in the Course of Official Travel Assignments,* B-199656 (quoting from the digest):

> It is a fundamental rule of law that a Federal employee is obligated to account for any gift, gratuity, or benefit received from private sources incident to the performance of official duty * * *.

That decision applied the rule to airline promotional programs. Specifically, we held that employees may not retain any half-fare coupon or bonus point or similar item of value which is only awarded incident to and on the basis of the purchase of an airline ticket used for official travel.

The rule has been applied to prohibit employees' personal use of airline mileage credits earned on official travel despite ever-changing airline promotional programs. Thus, in *Discount Coupons and Other Benefits Received in the Course of Official Travel,* 63 Comp. Gen. 229 (1984), we held that employees could not use travel bonuses for personal travel even if the government was unable to take advantage of the promotional award prior to its expiration. 63 Comp. Gen. 229, at 232 (Answer to Question 4).

In a companion decision we applied the rule to deny an employee's personal use of a promotional travel award even if the government was unable to use the award because the airline programs limited in some fashion the transferability of the award. *John D. McLaurin,* 63 Comp. Gen. 233 (1984). The most recent restatement of the rule is perhaps the most succinct--"Government coupons [that

is, coupons earned on official travel] should be used for Government purposes only * * *." *Phillip E. Trickett,* B-224054, March 17, 1987.

As can be seen, the rule has been unaffected by variations in the conditions or terms of an airline promotional program. Because our decisions in this area have followed the long-existing rules and regulations against personal use of promotional material, we have held employees liable for the value of the benefits received regardless of when the travel was performed. *John D. McLaurin, supra.* In that case, we required the employee to pay the full value of the bonus tickets used even though the tickets were used prior to our *Discount Coupons* decision.

Each AID employee contends that he was unaware of the prohibition and that he acted in good faith in utilizing the government-owned mileage credits. Messrs. Staples and LaMotte also note that they obtained agency approval to utilize the mileage credits for personal use. Enforcement of the laws and regulations governing the employment of federal government employees cannot be contingent upon knowledge of such rules by the affected employees. Neither the erroneous advice or authorization of an official nor the lack of knowledge of the rule create a right where one does not otherwise exist. *See, e.g., Riva Fralick,* 64 Comp. Gen. 472 (1985); *Reimbursement for Relocation Expenses,* 54 Comp. Gen. 747 (1975). Thus, the erroneous advice provided by AID officials to Messrs. Staples and LaMotte to the effect that the personal use of the travel bonuses was not objectionable cannot defeat application of this rule.

In sum, the rule prohibiting the use for personal travel of bonus mileage credits earned on official travel has been applied clearly and consistently in our decisions. There is, however, one area of uncertainty in our prior decisions concerning airline promotional benefits—the use of mileage credits earned on official travel for accommodation upgrades. We discussed and clarified this area in our 1986 report "Use of Airline Bonus Awards by AID Employees," *supra.* While not pertinent to the cases of the five AID employees before us now, we will take the opportunity to reiterate that clarification here.

Our 1986 report identified several instances in which AID employees had used bonus mileage credits which otherwise could have counted toward free trips in order to upgrade their accommodations on official travel from economy class to either business class or first class. This use of bonus mileage credits for accommodation upgrades was based on the employees' and AID's interpretation of a portion of our decision 63 Comp. Gen. 229, cited previously, which held:

> * * * items such as free upgrade to first class, membership in executive clubs, and check-cashing privileges * * * could only be used by the employee and could not be used by the Government. Therefore, we see no reason that these items could or should be turned over to the Government. We also hold that the employee may use such benefits because denying the employee such benefits would serve no purpose. 63 Comp. Gen. 229, at 232 (Answer to Question 3).

As indicated, this holding dealt only with "free" accommodation upgrades and other promotional benefits which could have no value to the government. The 1984 decision did not specifically address the redemption of mileage credits for program benefits such as accommodation upgrades, nor was it our intent to give

employees the option of redeeming mileage credits for this purpose without government approval. Allowing employees to use mileage credits for accommodation upgrades without government approval would conflict with the general rule in our line of decisions dating back to B-199656, July 15, 1981, and with the General Services Administration (GSA) regulations which hold that all bonus mileage earned as a result of official travel becomes the property of the United States Government and must be accounted for by employees. Thus, the GSA regulations, 41 C.F.R. § 101-25.103-2 (1986), citing our 1981 decision, state in part:

> (a) All promotional materials (e.g., bonus flights, reduced-fare coupons, cash, merchandise, gifts, credits toward future free or reduced costs of services or goods, etc.) received by employees in conjunction with official travel and based on the purchase of a ticket or other services (e.g. car rental) are properly considered to be due the Government and may not be retained by the employee. * * *
>
> (b) Promotional coupons that provide for future free or reduced costs of services (travel) should be integrated into the agency travel plans to maximize the benefits to the Government. * * *

Consistent with these principles, the rule prohibiting government employees from converting airline promotional items earned on official travel to their personal use also applies where an accommodation upgrade is obtained in exchange for bonus mileage credits. Therefore, employees must account for all mileage credits and may not exchange them for accommodation upgrades or other benefits absent authorization or approval. Currently, agency officials do not have authority to permit the use of first class air accommodations except as provided in the GSA regulations. However, there is no statutory restriction on employees using first class accommodations. *See* 5 U.S.C. § 5731 (1982). As a matter of policy, GSA has restricted the use of first class airline accommodations to the conditions set forth in paragraph 1-3.3d of the Federal Travel Regulations. In our view, GSA could amend its regulations to permit redemption of airline mileage credits to upgrade government purchased tickets to first class as part of a plan to maximize the integration of these incentive programs into agency travel plans. This would not only provide agencies with flexibility to efficiently manage their travel programs, but would also allow agencies to provide an incentive to their employees to participate in frequent flyer programs for the benefit of the government.

Finally, because the restrictions on the use of bonus mileage credit for accommodation upgrades had not been addressed specifically in our prior decisions, and in view of the practical difficulties of identifying airline tickets that have been upgraded, we will not require agencies to collect the value of unauthorized accommodation upgrades used prior to the date of this decision.

B-228910, November 16, 1987

Procurement

Competitive Negotiation
■ Requests for Proposals
■■ Evaluation Criteria
■■■ Subcriteria
■■■■ Disclosure

Protest challenging technical evaluation of proposal on ground that evaluation panel improperly relied on undisclosed evaluation factor is dismissed as academic where, after protest was filed, contracting agency reevaluated proposal based solely on the evaluation factors set out in the solicitation. Challenge to reevaluation is denied since there is no indication that it was based on undisclosed evaluation factor protester alleged was used by initial evaluation panel. Use of same evaluation panel to conduct both evaluations is not sufficient to call into question the validity of the reevaluation where there is no evidence of bias, bad faith or other improper conduct on the part of the evaluators.

Matter of: American Express Bank Ltd.

American Express Bank Ltd. protests the award of a contract to Merchants National Bank of Indianapolis under request for proposals (RFP) No. MDA903-88-R-1000, issued by the Army for military banking services. We dismiss the protest in part and deny it in part.

According to the Army, the military banking program was created in 1942 to allow American financial institutions to offer banking services similar to those offered in American banks to military personnel and Department of Defense civilians stationed overseas and their dependents. The RFP, issued on January 20, 1987, called for offers to provide the personnel, supplies and equipment necessary to operate military banking facilities in specified locations overseas. Offers under the RFP could be submitted on any combination of five line items, each covering a specified geographic area. Only two firms, American Express and Merchants, submitted initial proposals by the May 14 due date.

The RFP called for award of a cost-plus-fixed-fee contract to the responsible offeror whose offer was determined to be the best overall response, defined as the technically superior proposal with a realistic estimated cost. Section M-3 set out three evaluation factors, two regarding technical considerations and one regarding cost and fee, as follows:

(a) All technical proposals received will be evaluated in accordance with the evaluation factors listed below in descending order of relative importance.

(1) Offeror's ability to efficiently handle all aspects of military banking operations. Significant areas would include, but are not limited to, customer service, account penetration, staffing, methods of operation, and expertise in managing foreign currencies.

(2) Offeror's inclusion of innovative ideas that may improve services or decrease costs or both as detailed by plans or proposals to improve the quality, economy, or efficiency of the military banking program and the cost implications of those plans or proposals.

(b) Total estimated cost and proposed fee by [line item]. . . .

The RFP also specified that the first evaluation factor— ability to handle military banking operations—was worth more than the other two factors together, and thus was the most important of the three factors.

After a review of the initial proposals, the evaluation panel prepared a position paper for each offeror to establish a basis for discussions. Discussions with the offerors then were held in both June and July, with each round followed by the submission of best and final offers (BAFOs). On August 11, the Army called for a third round of revised BAFOs, to be submitted by August 13. The Army later decided that further discussions were required regarding the management fees proposed by the offerors. Discussions on that topic were held with Merchants in mid-August; American Express declined the opportunity for further discussions. Both offerors then submitted their final BAFOs before the August 20 due date.

Based on the final BAFOs, the evaluation panel gave Merchants a higher score than American Express on each of the three evaluation factors in the RFP (ability to operate the program, innovation, and cost/fee); Merchants' total score was approximately 25 percent higher than American Express' score. By memo dated August 20, the panel recommended that award be made to Merchants based on its higher score. Following a debriefing on its proposal by the chairman of the technical evaluation panel on August 28, American Express filed its protest with our Office on August 31.

American Express challenged the evaluation performed on its proposal in August, arguing that it was based on an evaluation factor, "United States retail banking experience," that was not specified in the RFP and was not disclosed to American Express during negotiations. American Express based its contention on a statement made at the August 28 debriefing by the chairman of the technical evaluation panel that "[a]s a wholesale bank, [American Express] does not have the focus independent of contract resources needed to remain current in the retail banking industry." As further support for its argument that retail banking experience was used as an evaluation factor, American Express referred to several technical subfactors set out in the evaluation guide developed by the technical evaluation panel. For example, with regard to "customer service," listed in the RFP as one of the significant areas to be considered in connection with the most important technical factor, the panel's evaluation guide set out four subfactors to be considered, including the:

> [a]bility to survey new services in the *retail banking industry* to determine which are appropriate for the [military banking program]. [Italic supplied.]

Further, since the evaluation guide listing the subfactors used by the evaluation panel was not disclosed to American Express until the Army's report on the protest, American Express in its comments on the report supplemented its protest with the contention that it was improper for the Army to rely on the subfactors in the evaluation guide which related to retail banking without disclosing them to the offerors.

The Army takes issue with each objection American Express raises to the August 20 evaluation of its proposal. The crux of the Army's position is that the

record of the evaluation shows that American Express' low score relative to Merchant's score under the principal technical factor—ability to handle all aspects of military banking operations—was based not on American Express' lack of United States retail banking experience, but on weaknesses in its ability, as a wholesale bank, to remain current in the retail banking industry. Further, the Army states that in the course of its legal review of the procurement after the protest was filed, it questioned the use in the August 20 evaluation of certain subfactors (unrelated to the allegedly undisclosed "retail banking" factor on which American Express bases its protest) which were not set out in the RFP. As a result, the evaluation panel was directed to reevaluate both proposals based solely on the factors set out in the RFP. Under that reevaluation, dated September 30, Merchants again received a higher total score than American Express, although the difference between the scores was reduced from 25 to 15 percent.

To the extent that American Express challenges the August 20 evaluation of its proposal, we find that the protest is academic and dismiss it since that evaluation was superseded by the September 30 reevaluation and thus no longer forms the basis of the Army's decision to make award to Merchants. *See OEA, Inc.*, B-226971, May 20, 1987, 87-1 CPD ¶ 530. While in describing the relief it sought in its initial submission, American Express itself listed a reevaluation of proposals based on the evaluation factors in the RFP as one means of satisfying its objections to the August 20 evaluation, American Express now argues that the reevaluation cannot cure the alleged defects in the August evaluation because it was performed by the same evaluation panel. We do not agree that the use of the same panel, standing alone, taints the reevaluation, and in the absence of any evidence of bias, bad faith or other improper conduct on the part of the evaluators, we see no basis to question the objectivity of validity of the reevaluation and we deny this aspect of the protest.

Further, we deny the protest to the extent that American Express objects to the reevaluation on the ground that, like the August evaluation, it improperly was based on an undisclosed evaluation factor or subfactors relating to retail banking experience. The Army states and the record shows that the reevaluation was based solely on the evaluation factors set out in the RFP; there is no indication that "United States retail banking experience," the alleged evaluation factor on which American Express bases its protest, was used. Since there is no evidence that the Army's alleged reliance on retail banking experience as an evaluation factor recurred in the September 30 reevaluation, and since American Express raised no other objections to it, we see no basis to challenge the reevaluation.

The protest is dismissed in part and denied in part.

B-226011, B-226900, November 17, 1987

Appropriations/Financial Management

Appropriation Availability

■ Purpose Availability

■■ Necessary Expenses Rule

Agency expenditure for seasonal decorations as necessary expenses may be properly payable where purchase is consistent with work-related objectives, agency or other applicable regulations, and the agency mission, and is not primarily for the personal convenience or satisfaction of a government employee. Agency must also determine that seasonal decorations are appropriate in light of constitutional consideration. GAO advises agencies to establish guidelines to prevent abuse in this area. 52 Comp. Gen. 504 (1973) is overruled and 60 Comp. Gen. 580 (1981) is modified to conform with this decision.

Matter of: Department of State & General Services Administration—Seasonal Decorations

This is in response to two separate requests from certifying officers from the Department of State and from the General Services Administration (GSA), for advance decisions regarding the propriety of certifying for payment vouchers for seasonal decorations. These cases provide us with an opportunity to redefine our position on the recurring issue of whether the cost of seasonal decorations for government offices is an expense properly payable from appropriated funds. These two requests are fundamentally similar and are briefly described below. For the reasons that follow, we conclude that appropriated funds may be used for seasonal office decorations.

Background

B-226011

The authorized certifying officer of the Financial Management Center in Bonn, West Germany for the Department of State asks our decision concerning the permissibility of certifying a reimbursement voucher for payment totaling $65.00 for Christmas decorations for the Embassy. Previous State Department guidance issued to all diplomatic and consular posts concluded that expenditures for seasonal decorations were permissible necessary expenses based upon two basic justifications: (1) the need to represent the seasonal traditions and customs of the United States; and (2) the need to create a pleasant and dignified atmosphere for the officials or guests who frequent the posts for personal or professional business. The State Department guidance specifically limited such expenditures to public area decorating. Although the submission was not clear, it would appear that the State Department "Acquisition and Maintenance of Buildings Abroad" appropriation is the intended source of funds.

An authorized certifying officer for GSA asks our decision regarding the permissibility of certifying three vouchers for payment, representative of a large number of unpaid vouchers for various seasonal decorations, including poinsettias, menorah candelabra and Christmas trees. The justification implicit in this request is to provide a pleasant working atmosphere in federal office buildings. Expenditures are to be charged to the Federal Building Fund, Real Property Operations activity under the authority of 41 C.F.R. § 101-26.103-2 which approves the expenditure of funds for the decoration of federal buildings under a plan.

Discussion

Neither of the agency functions represented here have appropriations which specifically provide funds for the purchase of seasonal decorations. Therefore, it is necessary in order to pay these expenses that they be determined to constitute necessary expenses for the agency in question. Our Office has viewed agency expenditures for decorative items to be necessary where the purchase is consistent with work-related objectives and the agency mission, and is not primarily for the personal convenience or personal satisfaction of a government employee. 64 Comp. Gen. 796 (1985) and 63 Comp. Gen. 110 (1983). Traditionally, we have allowed office decorations or improvements in public areas where they would contribute to a pleasant working atmosphere, thus improving morale and efficiency. 60 Comp. Gen. 580 (1981).

We have, however, objected to the purchase of decorations which are seasonal and not for permanent use. *See* 60 Comp. Gen. 580, *supra*. In 52 Comp. Gen. 504 (1973), we concluded that use of appropriated funds for purchasing seasonal decorations was not authorized. We informed the Bureau of Customs that providing Christmas decorations for government offices had no direct connection with, and was not essential to, the carrying out of the stated general purpose for which the funds were appropriated. We rejected the agency's argument that the seasonal decorations were similar to ordinary office improvements for permanent use.

We have reviewed our reasoning in these cases and now see no basis for continuing to follow our general prohibition against the use of appropriated funds for purchasing seasonal decorations. We think that if the same standards are used in judging the permissibility of expenditures for permanent office decorations as for seasonal decorations, it is difficult to explain why the result should turn on the relative life of the decoration. Therefore, agency expenditures for seasonal decorations as necessary expenses may be properly payable where the purchase is consistent with work-related objectives, agency or other applicable regulations, and the agency mission, and is not primarily for the personal convenience or satisfaction of a government employee.

We think seasonal decorations of the kind described are not subject to the objections we still have to sending Christmas cards on behalf of certain agency officials at public expense. These are basically individual good will gestures and are not part of a general effort to improve the work environment. *See* 64 Comp. Gen. 382 (1985).

In the present cases most of the expenditures are, except for the prohibition for seasonal decorations, the type of expenditures we have allowed as being consistent with work-related objectives such as the improvement of morale and efficiency. However, the nature of some of these decorations raise possible constitutional issues which also must be addressed in determining the appropriateness of these expenditures. For example, GSA's request includes vouchers for menorah candelabra. We caution agencies to be sensitive to the possibility that the display of certain seasonal decorations which are primarily religious in character could be viewed as an endorsement of religion lacking any clearly secular purpose and might therefore be challenged as government conduct prohibited by the Establishment Clause of the First Amendment.

Even if the display of religious symbols was found by a court not to be constitutionally objectionable,[1] the purchase of such symbols with public funds may prove offensive to some employees or visitors to the agency. Agencies must be sensitive to the concerns in determining where the line must be drawn, beyond which the display of a seasonal decoration would be inappropriate.

We urge each agency to establish administrative guidelines to prevent abuse of its newly sanctioned discretion to purchase seasonal decorations. We think such guidelines should address issues such as: (1) the purchase of seasonal decorations for private office areas, (2) the purchase of religiously significant seasonal decorations, and (3) any other purchase which is inconsistent with the agency's primary authority to enhance the work environment.

In summary, vouchers for seasonal decorations may be paid if the concerned agency determines administratively that the costs in question are necessary expenses, and that such seasonal decorations are appropriate in light of the above concerns. Our decision in 52 Comp. Gen. 504 is hereby overruled and 60 Comp. Gen. 580 is modified to conform to the result in this case.

[1] *See, e.g., Lynch, Mayor of Pawtucket v. Donnelly*, 465 U.S. 668 (1984).

B-228755, November 17, 1987

Appropriations/Financial Management

Appropriation Availability
■ Amount Availability
■■ Augmentation
■■■ Gifts/Donations
■■■■ Advertising

The United States Information Agency (USIA) is authorized to accept donations of radio programs from private syndicators for broadcast over Voice of America facilities in view of its broad statutory discretion to accept conditional gifts. And in the absence of any statutory prohibition on broadcasting commercials, we cannot say it is unlawful that a gift of programs is conditioned on the broadcast of commercial advertising. However, GAO notes longstanding federal policy concerns against this practice and suggests that before adopting a policy that would permit acceptance of advertising without explicit authority, USIA consider consulting with appropriate committees of Congress.

Matter of: United States Information Agency

The General Counsel of the United States Information Agency (USIA) has requested our opinion regarding the validity of certain "barter agreements" entered into by the USIA with three radio programming syndicators. These agreements provide for the furnishing of radio programs by the syndicators to the USIA's Voice of America (VOA) service to Europe, at no cost to the USIA. Commercials of up to 6 minutes per hour may be included in the programs, at the option of the syndicators, and the revenues generated as a result of the commercials would go to the syndicators.

For the reasons given below, we find that USIA has authority to accept donations of radio programs from private syndicators for broadcast over VOA, and that it is not unlawful that such donations are conditioned on the broadcast of commercial advertising. We agree, however, with the USIA's General Counsel, who raised a number of serious policy considerations which stem from the broadcasting of commercial advertising, in a memorandum dated December 11, 1986, addressed to the Director, VOA, for discussion purposes only.

Background

A key authority of the Director, USIA is the discretion to provide, when he deems it appropriate, for the preparation and dissemination abroad of information about the United States, its people and its policies. 22 U.S.C. § 1461 . VOA is the global radio network of the USIA which seeks to further that USIA initiative through direct radio communication abroad. The USIA administers the VOA program in accordance with the VOA charter which provides the governing principles of quality in VOA broadcasting. 22 U.S.C. § 1463 . Finally, USIA has broad authority to acquire materials and equipment through purchase or rental (22 U.S.C. § 1472) or through donations of money, real or personal property (22 U.S.C. § 2697) . This authority has been delegated to the Director, VOA. Delegation Order No. 85-6, Oct. 31, 1985.

All three of the agreements entered into by USIA with the syndicators contain essentially the same provisions. The agreements provide that the syndicators may include commercial advertising in the donated programs which the syndicators have been paid to carry by the sponsors of such advertising. The syndicators are to retain all proceeds from the commercials included in the donated programs. All programming and commercial content in the programs is subject to the prior approval by VOA. VOA is to use its best efforts to broadcast programs received at least once within 7 days of their receipt, and to verify such broadcasts.

According to the submission, the programming involved consists primarily of quality contemporary music along with some American sporting events. We are informed that without the contribution of these programs, VOA would be unable to provide this type of programming because of the high cost of acquiring performing rights and packaging the programs. We have also been informed that although the syndicators are permitted under the agreements to include commercials, none of the programs provided thus far have included any commercials. We understand that one of the syndicators has specifically stated that it has no intention of including any commercials.

Legal Discussion

The statutory language referred to above gives the USIA broad discretion in administering the VOA program and specifically in choosing the types of programs for broadcast. There is also no question that the USIA may accept gifts, both unconditional and conditional, although acceptance of conditional gifts must be approved by the Director, USIA.[1] Moreover, we know of no statutory prohibition in the VOA charter or any other legislation which would prohibit VOA from broadcasting commercial advertising. Therefore, we conclude that the Director, VOA has authority to accept a gift of programs for broadcast abroad, and we cannot say that it is unlawful that the gift is conditioned on the periodic broadcast of commercial advertising.

Policy Considerations

As the USIA General Counsel pointed out, "Federal policy, as distinct from Federal law, has traditionally opposed or discouraged commercial advertising in government publications and programs." We note that the Government Printing and Binding Regulations explicitly state that commercial advertising is not an authorized function of the government. *See* Government Printing and Binding Regulations, Joint Committee on Printing, U.S. Congress, Title III, sec. 13, p. 13 (reprinted 1986). In the case of the Corporation for Public Broadcasting, which has analogous functions, legislation has been enacted which specifically prohibits public broadcast networks or stations from making their facilities

[1] Subsection (a) of 22 U.S.C. § 2697 refers to acceptance of gifts by the Secretary of State. However, subsection (f) of that section confers the same authorities exercised by the Secretary on the Director of the USIA for his agency.

available to broadcast commercial advertising. *See* 47 U.S.C. § 399b(b)(2). These restrictions appear to be based on concern that the publication of advertisements might provide an unfair commercial advantage to a particular private firm by creating an impression that the government was endorsing that firm or its product. The General Counsel also suggests that the government might be seen as competing with private sector firms, the advertising content might distract the public from the mission of the agency, or, in some cases, might be inappropriate to maintain the dignity of the government.[2]

The USIA suggests in its submission that the GAO has already approved this type of "barter arrangement" in 63 Comp. Gen. 459 (1984). In that case, the Federal Communications Commission (FCC) accepted rent-free exhibition space and other free services at an industry trade show offered by the trade show promoters to set up a booth to provide the public with radio technology information. We did approve the arrangement as a reasonable *quid pro quo*. The FCC's exhibitions were regarded as popular drawing cards by the promoters but it lacked sufficient funds to accept many invitations to exhibit without the free services. To that extent, there is an analogy with the VOA situation. The submission states that without the donated materials "the agency [USIA] would be unable to provide this type of programming because of the high cost of acquiring performance rights and packaging the programs." However, the FCC decision is not really pertinent to the question before us; the FCC was not asked to include any commercial content in its exhibitions.

Conclusion

In sum, we find that the Director of VOA has authority to accept a gift of programs for broadcast abroad and we are aware of no statutory prohibition against the inclusion of commercial advertising in such donated programs. However, in view of the traditional federal policy against commercial advertising in government programs, we suggest that USIA consider consulting with appropriate committees of Congress before adopting a policy which would permit the inclusion of advertising in VOA broadcasts without explicit authority to do so.

[2] In answer to a question raised informally by a staff member in the USIA General Counsel's Office, a broadcast acknowledgement of the name of a donor is distinguishable from commercial advertising. No product is being "sold" to the public and there is no implication that the United States is endorsing the sponsor's product. *See* 47 U.S.C. § 399a, which permits the broadcast of "business or institutional logograms" by public radio and television stations in appropriate circumstances.

B-228958, November 17, 1987

Procurement

Competitive Negotiation
■ Best/Final Offers
■■ Technical Acceptability
■■■ Negative Determination
■■■■ Propriety

Where procuring agency advises the protester of the deficiency in its initial offer concerning fire safety, which was a mandatory requirement, and protester fails to address the deficiency in its best and final offer, the final offer was technically unacceptable and properly should not have been considered for award.

Procurement

Bid Protests
■ GAO Procedures
■■ Interested Parties
■■■ Direct Interest Standards

Where protester's offer was technically unacceptable, it is not an interested party to raise issues concerning the award because it does not have the requisite direct economic interest to be considered an interested party under the Bid Protest Regulations.

Matter of: Atrium Building Partnership

Atrium Building Partnership protests the rejection of its offer under solicitation for offers (SFO) No. 9PEL10-87-10, issued by the General Services Administration (GSA), for the lease of between 5,000 and 5,300 square feet of office space in the central business district area of Eugene, Oregon. Atrium alleges that GSA improperly applied the solicitation's fire safety criteria to its offer and made several errors in evaluating its offer.

We dismiss in part and deny in part the protest.

On May 11, 1987, GSA issued the SFO to provide space for the Social Security Administration, Office of Hearings and Appeals (OHA). Currently, Atrium is leasing space to GSA under the option term of a 5-year lease agreement which gives GSA the right to terminate the agreement with 60 days notice. Shortly before the expiration of the first 5-year term under Atrium's lease, GSA conducted a market survey of the prevailing rental rates in Eugene. GSA determined that it was more appropriate to resolicit its requirements than to exercise the option under Atrium's lease. Prior to issuing the SFO, GSA inspected several buildings of which seven were identified as acceptable to OHA. Atrium was among these, however, the acceptance of its building was conditioned upon the correction of fire safety and handicap access deficiencies.

Regarding fire safety, GSA determined that the atrium style interior of Atrium's building did not meet fire safety standards for fire rated exits, and that the north and south exits which entered the atrium were required to be separated by 1 hour fire rated walls. GSA Fire Safety Regulations PBS P

5900.2B, chapter 14, paragraph 9(d), which was a mandatory term of the SFO, states that "offices or other rooms used for human occupancy must not open into an atrium, nor may exit routes pass through an atrium." Therefore, by letter dated May 7, 1987, GSA informed Atrium of the fire safety deficiency found in its building and of the need to include a detailed description of how it intended to rectify the deficiency to comply with the mandatory terms of the solicitation.

On June 15, the day offers were due, GSA received four offers, including Atrium's. Negotiations were conducted with each offeror. On June 26 GSA advised Atrium that its offer did not contain sufficient detail with respect to the fire safety and handicap access deficiencies noted. GSA and Atrium differ as to the substance of these discussions. Atrium alleges that GSA advised that it had not conducted a formal survey of its building for fire safety, that there were no blueprints available on the building, and that a formal survey was appropriate. Further, Atrium alleges that GSA agreed to permit it to provide appropriate blueprints and plans showing the fire safety and mitigation systems and to conduct a formal survey with a fire safety professional. However, GSA reports that it never agreed to perform a formal survey because it would have been inappropriate. Rather, GSA states that Atrium proposed that its sprinkler system mitigated the fire safety deficiencies in its building. GSA states that it contacted the fire safety engineer who advised that a sprinkler system did not cure Atrium's fire safety deficiency and on June 26, GSA so advised Atrium and, further, that its best and final offer (BAFO) must include information describing how it intended to correct its fire safety deficiency, as well as the other weaknesses in its initial offer.

Despite these discussions, Atrium did not submit information in its BAFO showing how it planned to comply with the fire safety requirements. However, GSA continued to evaluate Atrium's proposal. The result of the evaluation was that of the four offers received, Atrium's offer was rated the third highest regarding quality and the third lowest with respect to price. Award was made to Hubert J. Perkins, who GSA rated second highest in quality and second lowest in price.

Atrium contends that GSA misapplied the fire safety regulations. It argues that, prior to determining that its building did not meet the regulations, GSA was required to conduct a risk assessment of its building with a fire safety professional. Further, Atrium contends that the determination that its offer did not satisfy the fire safety requirements was inappropriate because its offer contained a statement advising that it intended to meet the SFO's fire safety requirements. Moreover, Atrium contends that the evaluation process was improper because GSA did not examine relocation cost, made errors concerning the frame, access points and space planning of its building, permitted the awardee to substitute a new offer which did not meet the terms of the SFO and permitted all offers to expire before the award.

Initially, we note that GSA argues that Atrium's protest is untimely because Atrium was aware of the decision of GSA to treat its building as deficient in fire safety after July 1 as evidenced by letters mailed to the GSA, Realty Spe-

cialist concerning its compliance with fire safety requirements. Our Bid Protest Regulations provide that protest shall be filed not later than 10 working days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1987). While Atrium's letters indicate that Atrium disagreed with the fire safety assessment of its building, we do not find that Atrium had sufficient information to form its protest until August 11, 1987, when GSA informed it that award was being made to Perkins.

GSA reports that deviation from the fire safety regulations is permitted only if no other space is available and program professionals determine that the basic safety requirements have been met. PBS P 5900.2B, chapter 1, paragraphs 3(a) and (b). GSA states that because other offers were received in response to the SFO, a risk assessment of Atrium's building would have been inappropriate. Furthermore, GSA contends that due to the fire safety engineer's determination that a sprinkler system would not rectify Atrium's fire safety deficiency, the decision that Atrium did not comply with the fire safety requirements was reasonable.

In our opinion, Atrium has failed to establish that GSA acted unreasonably in evaluating its offer. Atrium does not dispute GSA's conclusion that the Atrium building did not meet the requirements of the regulations; rather it argues that GSA was required to perform a risk assessment with a fire safety professional. However, the fire safety regulations only permit deviation and a risk assessment where there are no other available spaces, which was not the case here. Indeed, section 12 of the SFO provides that offers which include alternate fire protection features must include a written analysis by a certified fire protection engineer fully describing any exceptions taken to the fire safety requirements. Therefore, Atrium had the burden of demonstrating compliance with the fire safety requirements of the SFO. By including a blanket statement that it intended to comply with fire safety, Atrium did not overcome this burden. We have held that a blanket offer to meet mandatory requirements does not substitute for a detailed description of how a firm plans to do so. *XYZTEK Corp.,* B-214704, Aug. 21, 1984, 84-2 CPD ¶ 204.

Further, during negotiations GSA specifically called Atrium's attention to the fire safety deficiency found in its offer, after consulting the fire safety engineer. In view of the fact that Atrium elected not to include this information in its BAFO, we find that Atrium's offer was technically unacceptable and that GSA should have rejected it as such, instead of continuing its evaluation. A proposal that has not been made acceptable after discussions properly may be rejected after BAFOs and the proposal may not be considered for award. *See Louisiana Foundation for Medical Care,* B-225576, Apr. 29, 1987, 87-1 CPD ¶ 451.

Given that Atrium's offer properly should have been rejected as technically unacceptable, we find that whether GSA allegedly made errors in the evaluation of the offer to be irrelevant. Moreover, Atrium is not an interested party to raise issues about the award to Perkins. Our Bid Protest Regulations require that a protester be an interested party, which is defined as a party having a direct economic interest in the award of a contract or proposed award of a con-

tract, before we will consider its protest. 4 C.F.R. §§ 21.0 (a) and 21.1 (a) (1987). A protester is not an interested party where it would not be in line for award if its protest were upheld. *Communications Facility Automation Systems International,* B-224181, Jan. 9, 1987, 87-1 CPD ¶ 40. Since Atrium's offer was technically unacceptable, we find that it is not an interested party to pursue this aspect of its protest.

Finally, regarding Atrium's allegation that offers were permitted to expire, we note that it is not improper for an agency to accept an expired offer without reopening negotiations. We have held that where, as here, the acceptance period has expired on all proposals, the contracting officer may allow the successful offeror to waive the expiration of its proposal acceptance period without reopening negotiations to make an award on the basis of the offer as submitted since waiver under these circumstances is not prejudicial to the competitive system. *Protective Materials Co., Inc.,* B-225495, Mar. 18, 1987, 87-1 CPD ¶ 303. Therefore, award to Perkins on August 11 was proper even though the offer had expired on August 1, 1987.

The protest is dismissed in part and denied in part.

B-228183, November 18, 1987

Procurement

Sealed Bidding
■ Invitation for Bids
■■ Competition Rights
■■■ Contractors
■■■■ Exclusion

Where contracting agency did not provide protester/incumbent contractor with the solicitation, in spite of several requests by the incumbent contractor that agency procurement officials do so, incumbent contractor was improperly excluded from the competition in violation of the Competition in Contracting Act of 1984, which requires "full and open" competitive procedures.

Matter of: Bonneville Blue Print Supply

Bonneville Blue Print Supply (Bonneville) protests the proposed award of a contract under invitation for bids (IFB) No. R4-87-09, issued by the Forest Service, U. S. Department of Agriculture, for reproduction services. Bonneville complains that even though it was the incumbent contractor the agency failed to provide it with a copy of the solicitation prior to the bid opening date, preventing it from competing under the solicitation.

We sustain the protest.

This procurement was for blueprint reproduction services for 1 year beginning October 1, 1987, with four additional 1-year options. The requirement was synopsized in the *Commerce Business Daily* (CBD) on July 17; the solicitation was issued on August 4. Eight potential bidders responded to the CBD synopsis and

requested a copy of the solicitation package, but only one bid, from Blueprint Reproduction Specialists (Blueprint), was received by the Forest Service at bid opening on September 3.

According to Bonneville and not disputed by the Forest Service, Bonneville, the incumbent contractor for the past 3 years, had worked with the contracting officer "in the past months on the new contract requirements" and on several occasions had informally requested that it receive a copy of the new solicitation package. However, after the CBD synopsis was published but before the solicitation was issued, the contracting officer retired. Bonneville's informal requests were not communicated to the successor contracting officer with the result that Bonneville was never sent a copy of the solicitation package. Bonneville points out that the new contracting officer should have been aware that it was the incumbent contractor since she signed an amendment modifying Bonneville's existing contract on August 21, a week and a half before bid opening under the new solicitation. Bonneville did not learn of the issuance of the new solicitation until September 4, 1 day after bid opening. Bonneville filed a protest with our Office on September 9, arguing that it had been improperly excluded from the competition and requesting that it be allowed to compete under a resolicitation.[1]

In response to Bonneville's arguments, the Forest Service contends that Bonneville should have been on notice of the procurement through the CBD notice, and should have formally requested a copy of the IFB in response thereto as did other potential bidders. Although the Forest Service admits that there was a lack of communication between the original and successor contracting officers concerning Bonneville's request for the solicitation package, it argues that there was no deliberate attempt to exclude Bonneville from the competition and that the one bid it did receive was at a reasonable price.

We believe the Forest Service fails to recognize that the Competition in Contracting Act of 1984 (CICA) places a duty on contracting agencies to take positive, effective steps toward assuring that all responsible sources are permitted to compete. Agencies are required when procuring property or services to obtain full and open competition through the use of competitive procedures. 41 U.S.C. § 253(a)(1)(A) (Supp. III 1985). "Full and open competition" is obtained when "all responsible sources are permitted to submit sealed bids or competitive proposals." *Id.* §§ 259(c) and 403(7) ompete for a particular contract. *See Trans World Maintenance Inc.*, 65 Comp. Gen. 401 (1986), 86-1 CPD ¶ 239. In so doing, we will take into account all of the circumstances surrounding a firm's nonreceipt of solicitation materials, as well as the agency's explanation. *Id.* Using this approach, we have sustained protests and recommended resolicitation where we

[1] Blueprint argues that pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.1(f) (1987), we should dismiss Bonneville's protest because it does not set forth its legal grounds, state the form of relief requested or specifically request a ruling by the Comptroller General. We think to do so would elevate form over substance since in its letter requesting our Office to "review the [Forest Service's] bidding procedures" Bonneville asserts that as the incumbent contractor it improperly was not provided with a copy of the IFB and "should be entitled to bid on this contract." In their substantive comments, neither Blueprint nor the Forest Service evidences any difficulty understanding the basis for Bonneville's protest or that what it seeks is an opportunity to participate in a resolicitation.

found that a firm's failure to receive a solicitation was the result of significant deficiencies on the part of the contracting agency. *See Trans World Maintenance, Inc.*, B-220947, *supra*, 86-1 CPD ¶ 239; *Dan's Moving & Storage, Inc.*, B-222431, May 28, 1986, 86-1 CPD ¶ 496.

We reach a similar result here. We find that Bonneville was improperly denied a copy of the solicitation in violation of CICA's requirement for "full and open" competition. Just as was the situation in *Trans World Maintenance, Inc.*, and *Dan's Moving & Storage, Inc.*, cases with similar fact patterns, Bonneville was the incumbent contractor performing the very same services for which the new procurement was conducted and there is nothing in the record to suggest that Bonneville is other than a responsible source. As we stated in the prior cases, the incumbent contractor had a right to expect to be solicited for the follow-on contract. In addition, Bonneville informally requested of the then-contracting officer a copy of the solicitation on several occasions before bid opening. While Bonneville did not make a formal inquiry in direct response to the CBD synopsis, we think the firm's attempts to obtain a copy of the solicitation were reasonable under the circumstances. Bonneville had asked the former contracting officer on several occasions to make sure it received a copy of the solicitation when issued. When the former contracting officer retired he failed to communicate Bonneville's request to his successor. The new contracting officer—while apparently aware that Bonneville was the incumbent contractor since she signed a modification to its contract a week and a half prior to bid opening—did not take the most obvious step which was simply to contact Bonneville, as the incumbent contractor, to include it in the competition under the new solicitation. The Forest Service has neither refuted these facts nor offered an adequate explanation for its failure to provide a copy of the solicitation to Bonneville. While we do not find evidence of any deliberate attempt by the Forest Service to exclude Bonneville from competing, we conclude that the Forest Service's actions prevented a responsible source from competing in violation of CICA's mandate for full and open competition. *See Dan's Moving & Storage, Inc.*, B-222431, *supra* at 1, 86-1 CPD ¶ 496 at 1.

To remedy this situation, we find that the appropriate course of action is for the Forest Service to resolicit. We recognize that rejecting bids after they have been publicly opened tends to discourage competition, because it results in making them public without award, which is contrary to the interests of the low bidder, and because rejection means that bidders have expended effort and money to prepare their bids without the possibility of acceptance. *See Trans World Maintenance, Inc.*, B-220947, *supra* at 6, 86-1 CPD ¶ 239 at 6. However, in view of the congressional mandate for "full and open" competition, we believe that the government's interests are best served in the present case by canceling the solicitation and giving all responsible sources a fair opportunity to compete on the resolicitation, especially in light of the fact that only one bid was received in response to the original solicitation. We therefore are recommending that the Forest Service cancel the invitation and resolicit bids using full and open competitive procedures.

The protest is sustained.

B-228000, November 19, 1987

Procurement

Competitive Negotiation
■ Offers
■■ Evaluation
■■■ Technical Acceptability

Agency properly rejected offer to furnish surplus property where the protester failed to provide sufficient information to establish that the surplus items met all the requirements of the solicitation and the agency considers the items critical to the safety of persons and property.

Matter of: Amity Merchandise Products Corporation

Amity Merchandise Products Corp. (Amity) protests the rejection of its offer to furnish surplus hydraulic servovalves (valves) in response to request for proposals (RFP) No. N00383-87-R-0696 issued by the Navy Aviation Supply Office (ASO). Amity contends that the agency failed to give its proposal full and fair consideration and that rejection of its proposal was unreasonable and not in the best interest of the government.

We deny the protest.

On June 12, 1986, ASO published notice in the *Commerce Business Daily* (CBD), of its intent to order 25 valves for the F-14 aircraft, Grumman Aerospace Corp. (Grumman) part number (P/N) A51H9038-3, from Grumman under a basic ordering agreement. According to ASO, data sufficient for competitive procurement is not available and cannot therefore be furnished by the government.

In response to this CBD announcement, ASO received two unsolicited offers from Amity and D. Moody & Co., Inc., on June 26 and July 10, respectively. Each firm offered to furnish a partial quantity of seven surplus valves; both firms identified the manufacturer of these valves as Moog Inc. On November 12, ASO again synopsized the requirement in the CBD. The RFP, issued on the same day, sought 25 valves manufactured in accordance with Grumman source control drawing P/N A51H9038-3 from the only known approved source of supply for this P/N, which is Moog. The Navy reports that Moog's P/N applicable to Grumman's source control drawing is P/N 010-69996-1. The RFP incorporated by reference a new material clause which required offerors to represent that the parts to be supplied, including any former government property identified as surplus, would be new, not used or reconditioned, and not of such age or so deteriorated as to impair their usefulness or safety. The solicitation further required under the government surplus clause incorporated therein that a firm intending to offer former government surplus property attach to its offer a separate sheet containing a complete description of the items, the quantity to be

supplied, the name of the agency from which the items were acquired and the date of acquisition.

ASO received two offers in response to the RFP. The manufacturer, Moog, offered to furnish the total quantity of 25 valves at a unit price of $3,551.[1] The protester offered a partial quantity of seven surplus valves at a unit price of $2,200. In its proposal, Amity indicated that the valves were manufactured by Moog and were purchased by Amity from Grumman "contract termination."

Accompanying Amity's proposal were test acceptance data sheets for one valve, serial number 47. Each test acceptance data sheet for this valve was stamped "Repair." In response to ASO's request for further information, Amity by letter dated May 11, 1987, submitted test acceptance data sheets for the other six valves,[2] a completed surplus certification with addendum, and a copy of its unsolicited proposal of June 26, 1986. In its May 11 letter, Amity advised the contracting officer that the firm was resubmitting the seven valves to Moog for a current test and evaluation report and copies of the current test results would be furnished to the contracting officer. By letter dated June 19, 1987, the contracting officer rejected Amity's offer on the grounds that the surplus valves did not meet the relevant regulation governing the acquisition of surplus property. Specifically, the contracting officer determined that the Federal Acquisition Regulation (FAR), 48 C.F.R. § 10.010(b) (1986), applied to this procurement and Amity's surplus items failed to meet the four factors set forth in that provision. In relevant part that provision states:

(b) Contracting officers shall consider the following when determining whether used or reconditioned materials, former Government surplus property, or residual inventory are acceptable:

(1) Safety of persons or property.

(2) Total cost to the Government (including maintenance, inspection, testing, and useful life).

(3) Performance requirements.

(4) Availability and cost of new materials and components.

ASO therefore awarded the contract on June 19 to the manufacturer, Moog. Amity filed an agency level protest, which was denied, and this protest to our Office followed.[3]

The gravamen of Amity's protest is that ASO's rejection of its offer was without a reasonable basis. In this regard, Amity points out three specific factors which it believes the contracting officer should have considered, but which were not properly considered in evaluating its offer: (1) The favorable inspection and testing data obtained from Moog in 1977 and 1987 for all seven valves; (2) Moog's certification that the valves "meet(s) the specification requirements", and that

---

[1] ASO reports that Moog's proposed unit price for a partial quantity of 18 valves is $3,922.

[2] All but one page of the test data sheets for these six valves were stamped "Repair" and the year indicated on these data sheets for all seven valves was 1977.

[3] As a preliminary matter, ASO contends that Amity's protest should be dismissed pursuant to section 21.1(d) of our Bid Protest Regulations, 4 C.F.R. § 21.1(d) (1987), because a copy of the General Accounting Office protest was not received by the contracting officer until 7 days after the protest was filed at our Office. We conclude that dismissal of Amity's protest is not warranted under these circumstances where, as ASO concedes, the agency knew Amity's bases of protest since Amity had initially filed its protest with the agency.

(3) Moog "attested" that the "condition of the valves is the same as purchased directly from Moog."

Amity argues that had ASO conducted its evaluation of the firm's surplus offering in a "fair" and "equitable" manner, the contracting officer should not have concluded that the valves did not meet the specification requirements. The protester challenges ASO's refusal to recognize the validity of the test reports from Moog and takes further exception to the contracting officer's conclusion that the government would incur substantial labor costs associated with additional testing and inspection of the valves. Amity asserts that further "overhaul inspection and dimensional checks" need not be performed since the valves had been inspected and tested by the manufacturer, Moog, as recently as June 1987 and those results were furnished to the government by the protester. On the basis of these test reports, Amity further asserts that the valves meet the performance requirements of the specifications; that no "useful life span" has been consumed; and that there should be no difference in maintenance costs for its "overhauled" versus "new" valves. Amity's final contention concerns the fact that in its view, the firm's low unit price would result in substantial cost savings to the government.

In its response to the protest, ASO submitted a detailed explanation of its reasons for rejecting Amity's offer. Preliminarily, ASO points out that the contracting officer's decision to reject Amity's offer was based, as previously noted, on the four factors enunciated in FAR, 48 C.F.R. § 10.010(b). Concerning the first factor, safety of persons or property, ASO states that the valve being acquired is a critical safety of flight item which is mounted on the glove vane cylinder assembly of the F-14 aircraft. This glove vane cylinder assembly provides hydraulic fluid to control the extension and retraction of the glove vanes (flaps) and the valves being procured control the flow of hydraulic fluid into the glove vane cylinder assembly. According to ASO, failure of the valve could lead to the failure of the glove vane cylinder assembly and ultimately loss of control of the aircraft.

ASO states that the contracting officer reviewed all the documentation furnished by Amity to support its offer—including its surplus certification, the acceptance and test data sheets— and concluded that Amity had failed to demonstrate that the items meet the specification requirements. For example, the agency contends that Amity did not furnish any manufacturing records to indicate when the valves were built or if the valves were built to Grumman's source control drawing A51H9038-3 and Moog drawing 010-69996-1. Moreover, the agency notes that the word "REPAIR" was stamped on all but one of the pages of the test data furnished by Amity; however, no information or repair records were provided by Amity to show what was repaired; when the units were repaired; what parts, if any, were replaced; who performed the repair or to what standard the repair work was performed. In view of this uncertainty and lack of adequate information, the contracting officer determined that acceptance of these valves would pose undue risks to person and property.

As for the total cost to the government (including maintenance, inspection, testing and useful life) factor, the agency reasons that the government would incur substantial costs in determining the internal condition and useful life of the valves since Amity did not provide complete manufacturing and repair data. According to ASO, the Grumman source control drawing A51H9038-3 requires that the valves have an operating life of 6,600 hours and a useful life of 6,000 flight hours. Insofar as the protester had not submitted any supporting evidence that the 10-year-old valves it proposed to furnish would meet the operating life or useful life requirements, the contracting officer was unable to determine how much or if any of the valves' useful lives had been consumed.

ASO further reports, and the record confirms, that in its surplus certification, Amity was unable to certify that the surplus items meet all the drawing and specification requirements of the solicitation and Amity further indicated that it did not intend to refurbish the valves or to replace cure-dated or sensitive components. Thus, ASO maintains the agency would be required to independently determine the internal condition of the valves and that process would require ASO to disassemble the valves and perform an internal inspection, testing and replacement of parts, where necessary. Consequently, the agency refutes Amity's claim that the cost of maintaining the overhauled surplus valves should be no different than the cost of maintaining new valves since the internal condition of the overhauled valves is unknown.

Concerning the performance requirements factor, ASO asserts that the protester has not submitted any in-process inspection data or manufacturing data from which one could determine whether these valves were manufactured to any performance requirements. Specifically, the agency refers to two performance requirements specified in the Grumman source control drawing, *i.e.*, a shelf life of 10 years and an operating life of 6,600 hours. ASO claims Amity has failed to show that its offer meets these two requirements. Additionally, the agency reiterates Amity's failure to show that the valves were manufactured in accordance with Grumman's source control drawing A51H9038-3 and Moog's drawing 010-69996, and Amity's failure to certify that the valves meet the specification's requirements.

As to the availability and cost of new materials and components factor, the contracting officer compared the cost of acquiring the total quantity from the manufacturer, Moog, with the cost of acquiring partial quantities from Moog and Amity and concluded that any potential savings to the government would be *de minimis.*[4] However, the contracting officer reasoned that any potential savings

[4] As previously noted, Moog's per unit price quote for a partial quantity of 18 valves was $3,922. On this basis, the contracting officer calculated the potential savings as follows:

Offeror	Qty	Unit price	Total price
Moog	25	$3,551	$88,775
Offeror	Qty	Unit price	Total price
Amity	7	$2,200	$15,400
Moog	18	$3,922	$70,596
		Total	$85,996
		Total savings -	$2,779

to the government if the valves were acquired from Amity and Moog would be negated if the cost for all necessary refurbishment or replacement of cure-dated or age sensitive parts in the surplus valves were added to Amity's unit price.

In rejecting Amity's offer, ASO analogizes the situation here to that in *Hill Industries, Inc.*, B-209884, Aug. 24, 1983, 83-2 CPD ¶ 246, in which we found the agency's rejection of a proposal to furnish surplus items to be reasonable in light of a critical need for reliability of operation throughout the system life where: (1) the equipment would be used in the starter assembly of jet aircraft, (2) the protester's surplus offering failed to include historical data for the items from the time they left the manufacturer's facilities, and (3) the Air Force was unable to determine the current condition of the surplus items. The agency also cites a number of our prior cases recognizing the legitimate concerns of a procuring agency as to where, when, why and how an item became surplus. *See, e.g., D. Moody & Co., Inc.*, B-214026, Sept. 25, 1984, 84-2 CPD ¶ 365. ASO contends therefore that its rejection of Amity's proposal was proper.

In comments on the agency report, Amity takes issue with the agency's rationale for rejecting its offer. However, many of Amity's exceptions are based on its premise that the agency refuses to give any significance or validity to the test reports obtained from Moog in which Moog purportedly "attested" to the "current conformity" of Amity's surplus offering to Moog's "test requirements."

The protester further contends that the firm was never informed of, nor given an opportunity to respond to, the various concerns cited by ASO in the agency's report on the protest. For example, Amity alleges that ASO did not request any historical data for the items from the time they left the manufacturer's facility, or any data concerning the internal condition of the valves and/or any cure-dated or age-sensitive components. Finally, the protester questions the reasonableness of Moog's unit price for a partial quantity of 18 valves on the basis that Moog's proposed unit price for 18 valves reflects an increase of more than $700 over Moog's 1985 unit price for 20 valves.

As ASO correctly points out, we have long recognized that the critical nature of the functions that certain equipment has to perform, creates a legitimate need for an agency to know where, when, why and how an item became surplus. *See Hill Industries, Inc.*, B-209884, *supra; D. Moody & Co., Inc.*, B-214026, *supra* at 6. We have also held that the procuring agency is responsible for determining its minimum needs since the agency is in the best position to ascertain its needs due to familiarity with the particular requirements and environments in which the items will be used. Thus, we will not question an agency's determination of its minimum needs or the technical judgment forming the basis for that deter-

mination unless it is clearly shown to be unreasonable. *See CMI Corp.*, B-216164, May 20, 1985, 85-1 CPD ¶ 572 at 3.

We think ASO acted reasonably in rejecting Amity's offer. In our view, Amity's offer to provide valves that are at least 10 years old and which, according to Amity, "appear to have been completely reconditioned, overhauled and tested" does not constitute an offer to provide new, not used or reconditioned valves as required by the solicitation's new materials clause. The record shows that Amity relies, almost exclusively, on the fact that the valves were tested in 1977 and 1987 by the original manufacturer, Moog, and found to meet "all spec. requirements." However, the fact that Moog may have found these valves meet "all spec. requirements" is not relevant since these test acceptance documents do not indicate which specification requirements Moog is referencing, nor does Moog or Amity affirmatively state that the valves meet the specification requirements set forth in this current solicitation.

Moreover, given the critical nature of the items in question, we think it was reasonable for the agency to be concerned about the lack of the original manufacturing or historical data on the items offered by Amity. While Amity has strongly argued that ASO is adequately protected because the original manufacturer, Moog, has "attested" to the condition of the valves, we are not persuaded that this is a viable substitute for historical or manufacturing data. We note, for instance, that Amity baldly asserts that according to Moog, its surplus valves meet the useful life requirement of 6,000 flight hours; however, Amity proffered no independent data to support or corroborate this assertion. In other words, we are not in a position to question ASO's conclusion that Amity has failed to provide meaningful data to establish the acceptability of its surplus offering pursuant to FAR, 48 C.F.R. § 10.010(b). In sum, since Amity did not submit an offer that met the requirements of the solicitation, ASO's rejection of its offer was proper.

Since we find Amity's offer was properly rejected we need not consider its protest that Moog's proposed price for a partial quantity of 18 valves was unreasonable.

Accordingly, the protest is denied.

B-229085, November 30, 1987

Appropriations/Financial Management

Appropriation Availability

■ Purpose Availability

■■ Specific Purpose Restrictions

■■■ Personal Expenses/Furnishings

Purchase of steel toe safety shoes by a District Office of the Internal Revenue Service (IRS) for a supply clerk whose work includes movement of heavy objects with various equipment is authorized under Section 19 of the Occupational Safety and Health Act (OSHA) of 1970, if such footwear is

administratively determined to be necessary for safety reasons to protect the clerk from the possibility of foot injury. As a federal agency the IRS is subject to OSHA regulations and must satisfy standards set by the Secretary of Labor for personal protective equipment.

Matter of: Internal Revenue Service—Purchase of Safety Shoes

We have been asked by an authorized certifying officer of the Internal Revenue Service (IRS) for an advance decision on the legality of purchasing safety shoes for a supply clerk whose work includes moving heavy objects. For the reasons that follow, we find such payment is proper.

On March 5, 1987, the IRS District Office in Des Moines, Iowa, purchased safety shoes with steel toes for use by the supply clerk. Work performed by the clerk involved moving heavy objects such as files, desks, and pallets using a variety of equipment— trucks, jacks, and dollies. It was administratively determined by the Chief, Facilities Management Branch (FMB) in Des Moines, that such shoes were necessary to protect the supply clerk from the real possibility of serious foot injury.

As a federal agency, the IRS is subject to Section 19 of the Occupational Safety and Health Act of 1970 (OSHA), and must establish occupational safety and health programs consistent with standards promulgated by the Secretary of Labor. 29 U.S.C. § 668 (1987). Under these standards, the general requirement is that personal protective equipment for extremities must be provided, used, and maintained whenever hazards of processes or environment may cause injury or impairment in the function of any part of the body. 29 C.F.R. § 1910.132(a) (1986). Occupational foot protection—safety toe footwear—is specifically mentioned as a type of safety equipment. 29 C.F.R. § 1910.136 (1986).

Previously this Office has allowed expenditures on protective footwear for Drug Enforcement Administration agents assigned to temporary duty in jungle environments upon administrative determination under Section 19 of the Occupational Safety and Health Act that such footwear was necessary to protect agents from jungle hazards. B-187507, December 23, 1976. We have also certified reimbursement for ski boots purchased for a U.S. Forest Service snow ranger in accordance with OSHA regulations and proper administrative determination by the District Forest Ranger for such need. B-191594, December 20, 1978. OSHA regulations were also the basis for authorizing the purchase of down-filled parkas for Department of Interior employees assigned to Alaska or high country during the winter months. 63 Comp. Gen. 245 (1984).

Paragraph 1(14)71.4(4) of the *Internal Revenue Manual* states:

> Regional Commissioners are responsible for the safety of all personnel under their jurisdiction and shall ensure the installation and development of adequate accident and fire prevention programs within their respective regions.

In turn, the Resources Management Division of the IRS has advised us that Regional Office directives designate Chiefs, Facilities Management Branch (FMB) as responsible for developing and administering safety policies within their respective areas. In the instant case, it is clear from the record submitted that the

Chief, FMB of the Des Moines Office specifically authorized the purchase of safety shoes. Since the safety shoes were administratively determined to be necessary for employee safety under the IRS Regional Commissioner Directive, we conclude that appropriated funds may be used for their purchase. It is, of course, understood that the acquisition was approved in accordance with authorized procedures and that title to the shoes will vest in the United States.

Finally, 5 U.S.C. § 7903 (1987) authorizes purchases of special clothing for the protection of personnel in the performance of their assigned task. To qualify under this section three tests must be met: (1) the item must be "special" and not that which an employee would ordinarily furnish for himself; (2) the item must be for the benefit of the government, that is, essential to the safe and successful accomplishment of the work; and (3) the employee must be engaged in hazardous duty. *See* 63 Comp. Gen. 245, 247 (1984). The purchase of the safety shoes meets the above test. First, safety shoes are not normally purchased by employees and so could be considered special. Second, the record submitted shows that the shoes were purchased in order to reduce the risk of injury to the employee, and, as indicated above, were required to be provided under OSHA and its implementing regulations. Third, the movement of heavy objects using a variety of equipment does involve the danger of foot injury.

We conclude that under these circumstances, appropriated funds may be expended to procure safety shoes for a supply clerk who uses various equipment to move heavy objects.

Appropriations/Financial Management

Appropriation Availability
■ Amount Availability
■■ Augmentation
■■■ Gifts/Donations
■■■■ Advertising

The United States Information Agency (USIA) is authorized to accept donations of radio programs from private syndicators for broadcast over Voice of America facilities in view of its broad statutory discretion to accept conditional gifts. And in the absence of any statutory prohibition on broadcasting commercials, we cannot say it is unlawful that a gift of programs is conditioned on the broadcast of commercial advertising. However, GAO notes longstanding federal policy concerns against this practice and suggests that before adopting a policy that would permit acceptance of advertising without explicit authority, USIA consider consulting with appropriate committees of Congress.

90

■ Purpose Availability
■■ Credit Cards
■■■ Fees

Under 16 U.S.C. § 460*l*-6a(f) (1982), the Department of Agriculture (USDA) may allow credit card companies to deduct their commissions from the proceeds of commercial credit card transactions charged to the public for "reservation services." However, without additional statutory authority, commissions on credit card transactions for other kinds of USDA services or fees must be paid from current operating appropriations.

48

■ Purpose Availability
■■ Necessary Expenses Rule

Agency expenditure for seasonal decorations as necessary expenses may be properly payable where purchase is consistent with work-related objectives, agency or other applicable regulations, and the agency mission, and is not primarily for the personal convenience or satisfaction of a government employee. Agency must also determine that seasonal decorations are appropriate in light of constitutional considerations. GAO advises agencies to establish guidelines to prevent abuse in this area. 52 Comp. Gen. 504 (1973) is overruled and 60 Comp. Gen. 580 (1981) is modified to conform with this decision.

87

■ Purpose Availability
■■ Specific Purpose Restrictions
■■■ Personal Expenses/Furnishings

Purchase of steel toe safety shoes by a District Office of the Internal Revenue Service (IRS) for a supply clerk whose work includes movement of heavy objects with various equipment is authorized under Section 19 of the Occupational Safety and Health Act (OSHA) of 1970, if such footwear is administratively determined to be necessary for safety reasons to protect the clerk from the possibil-

ity of foot injury. As a federal agency the IRS is subject to OSHA regulations and must satisfy standards set by the Secretary of Labor for personal protective equipment.

104

Claims Against Government
■ Burden of Proof
■■ Factual Issues

Claims or demands against the government which seek payment for supplies or services sold to it must be accompanied by adequate evidence of delivery to or acceptance by an appropriate government official of the goods or services at issue.

72

■ Burden of Proof
■■ Factual Issues
■■■ Credit Cards

Oil companies participating in the United States Government National Credit Card Program (SF-149) may be permitted to adopt new technologies which result in the elimination of signed paper "delivery tickets" (e.g., credit card charge receipts), if appropriate auditing and accounting controls are maintained and the government's ability to settle claims, conduct audits, and litigate false and fraudulent claims, are otherwise adequately protected.

72

■ Burden of Proof
■■ Factual Issues
■■■ Credit Cards

The United States Government National Credit Card Program (SF-149) should be modified to require users of the SF-149 credit card to tender their government "ID" along with the SF-149, so that the station operator can verify the user's name and official status.

72

■ Burden of Proof
■■ Factual Issues
■■■ Credit Cards

When settling oil company credit card claims against the United States, conducting audits, or prosecuting false or fraudulent credit card claims, the government needs to be able to satisfy itself, based on the "documents" which evidence those transactions, that an authorized individual used a valid card to properly service or supply an official vehicle engaged on official business.

72

Civilian Personnel

Travel

■ Bonuses

■■ Acceptance

■■■ Propriety

Five AID employees traveling on official business participated in airline frequent flyer programs and earned free tickets which they used for personal travel. AID found the employees liable for the value of the tickets used and the employees appeal. Decisions of the Comptroller General have consistently applied the rule that airline promotional mileage credits earned on official travel may only be used for official travel and may not be used by employees for personal travel. Thus, the employees are liable for the full value of the tickets. Erroneous advice of agency officials cannot defeat application of the rule.

79

■ Bonuses

■■ Acceptance

■■■ Propriety

The rule requiring an employee to account for airline promotional material earned on official travel applies to benefits such as accommodation upgrades to business class or first class when they are obtained in exchange for mileage credits. Therefore, an employee may not exchange mileage credits for accommodation upgrades absent authorization or approval by the appropriate agency official. 63 Comp. Gen. 2[illegible] (1984) clarified. The restrictions on the use of first-class travel contained in FTR para. 1-3.3d now apply to upgrades obtained in exchange for mileage credits, but could be revised in order to maximize the integration of airline incentive programs into agency travel plans. Collection of the value of the unauthorized or unapproved upgrades used prior to this decision is not required.

80

Competitive Negotiation
■ Requests for Proposals
■■ Evaluation Criteria
■■■ Cost/Technical Tradeoffs
■■■■ Weighting

Where the request for proposals (RFP) indicates that technical/performance, cost, and production capability will be considered in the evaluation of proposals, without any indication of each factor's relative weight, each factor is assumed to be accorded substantially equal weight in the evaluation; protest of the evaluation is sustained where the agency considered the technical/performance factor to be significantly more important than the other factors set forth in the RFP.

59

Competitive Negotiation
■ Best/Final Offers
■■ Technical Acceptability
■■■ Negative Determination
■■■■ Propriety

Where procuring agency advises the protester of the deficiency in its initial offer concerning fire safety, which was a mandatory requirement, and protester fails to address the deficiency in its best and final offer, the final offer was technically unacceptable and properly should not have been considered for award.

93

■ Discussion
■■ Adequacy
■■■ Criteria

Discussions cannot be meaningful if an offeror is not apprised that its price exceeds what the agency believes to be reasonable.

89

■ Discussion Reopening
■■ Auction Prohibition

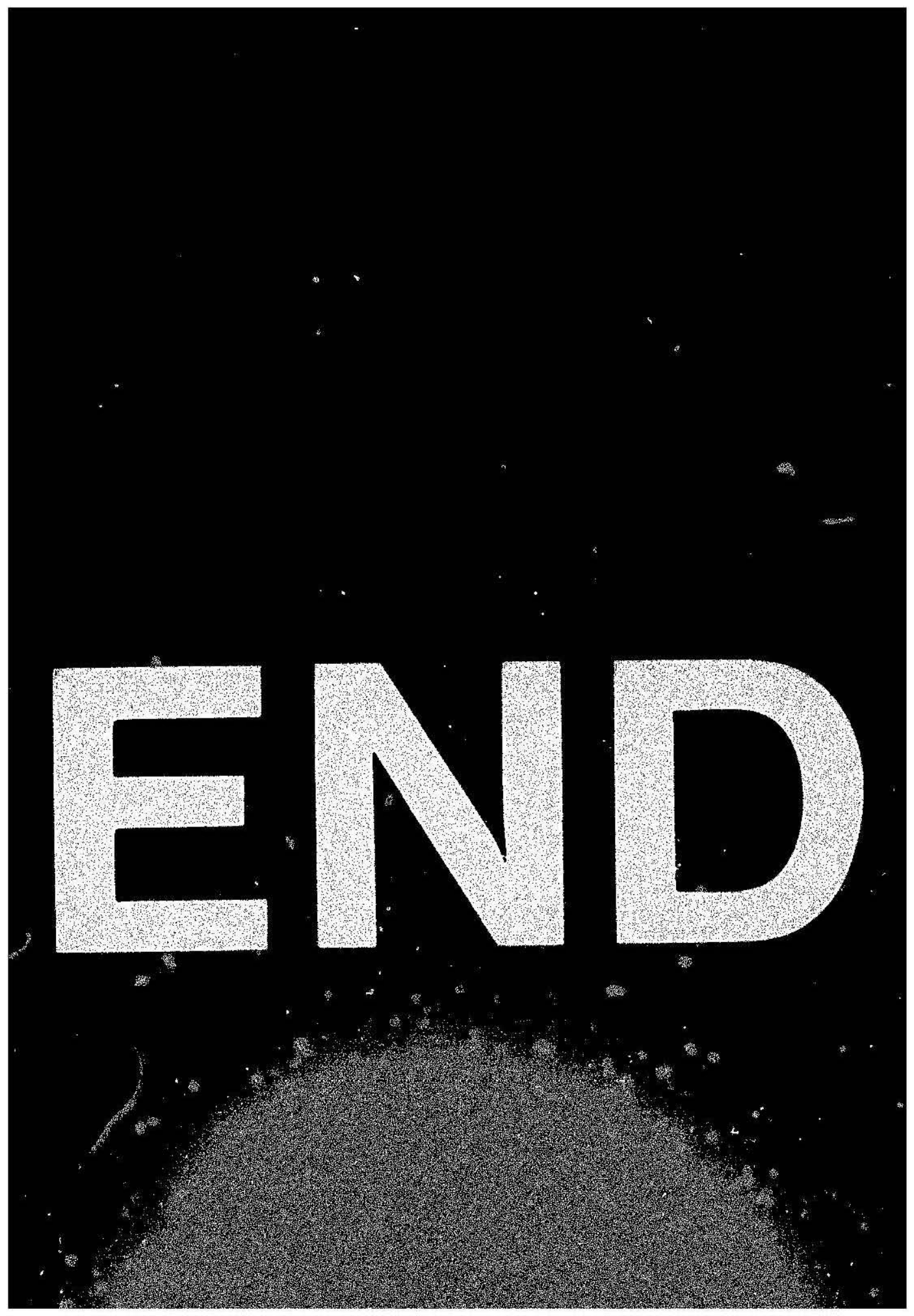
Where reopening of negotiations is properly required, notwithstanding the disclosure of an offeror's proposal, this does not constitute either technical leveling or an improper auction.

39

■ Offers
■■ Evaluation Errors
■■■ Non-Prejudicial Allegation

Contracting agency's failure to inform protester of deficiencies in its technical proposal, which was included in the competitive range, deprived the protester of the opportunity to participate in meaningful discussions. Protester, however, was not prejudiced since its cost proposal was so much higher

Compiled in the Office of the General Counsel
Legal Publications and Writing Resources Section


END